

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

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No. 252.

FEDERAL TRADE COMMISSION, PETITIONER

V.  
UNITED SHIRT & SHIRT COMPANY.

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FILED IN OFFICE OF CLERK OF SUPREME COURT, OCTOBER 10, 1921.  
AT WASHINGTON, D. C.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

FEDERAL TRADE COMMISSION, PETITIONER,

*vs.*

WINSTED HOSIERY COMPANY, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals, for the Second Circuit.

Winsted Hosiery Company, petitioner, *vs.* Federal Trade Commission, respondent.

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION.

1

PETITION

In the United States Circuit Court of Appeals, for the Second Circuit.

FEDERAL TRADE COMMISSION

*v.*

WINSTED HOSIERY COMPANY, RESPONDENT.

The petition of the Winsted Hosiery Company respectfully shows to this court:

I. That your petitioner is a resident of the State of Connecticut, having its principal office and place of doing business in the town of Winsted, in said State, and that for more than two years last past has been engaged in the manufacture and sale of underwear and other wearing apparel.

2 II. That on or about the 30th day of October, 1918, your petitioner was served with a complaint by the Federal Trade Commission, a copy of which is hereunto annexed, marked "Exhibit A," and made a part hereof, wherein it was charged as follows: "That for more than one year last past, the respondent, Winsted Hosiery Company, with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has, in the conduct of its business manufactured and sold in commerce aforesaid, and labeled, advertised, and branded certain lines of underwear composed of but a small amount of wool as:

"Men's Natural Merino Shirts."

"Men's Gray Wool Shirts."

"Men's Natural Wool Shirts."

"Men's Natural Worsted Shirts."

"Australian Wool Shirts."

That such advertisements, brands, and labels are false and misleading and calculated and designed to, and do, deceive the trade and general public into the belief that such underwear is manufactured and made and composed of wool."

3 III. That your petitioner duly appeared before said Federal Trade Commission by its attorneys, Messrs. Wood, Molloy & France, of 25 Broad Street, New York, and filed its answer to the aforesaid complaint, wherein and whereby it denied the aforesaid allegations as follows: "Denies each and every allegation contained in paragraph marked 'Paragraph third' of the complaint herein, except that the respondent admits that for more than one year

last past it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labelled, advertised, and and branded certain lines of underwear as:

"Men's Natural Merino Shirts"

"Men's Gray Wool Shirts"

"Men's Natural Worsted Shirts"

"Australian Wool Shirts"

"Men's Natural Wool Shirts"

And respondent further admits that such underwear so manufactured and made are not composed wholly of wool." That your petitioner set forth as a separate defense the following:

"That for the past twenty years and at the present time, it has been a general custom and practice in the underwear business to manufacture, label, advertise and brand underwear as 'Natural Merino,' 'Wool,' 'Natural Wool,' 'Natural Worsted,' and 'Australian Wool' when such underwear so described is not composed wholly of wool, but on the contrary are composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served; and further, that said general custom and practice has been and now is universal in the underwear trade throughout the United States and has been followed by all the manufacturers engaged therein; and further, that said general custom and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States.

"That for many years up to and including the present time, underwear has been in large quantities imported into the United States from foreign countries and the same have come into direct competition with the underwear manufactured in the mills throughout the United States; and further, that the underwear so imported into the United States has been and now is labeled, branded and advertised as 'Wool,' 'Merino,' and 'Worsted' underwear in accordance with the general custom and practice in the underwear trade in the United States, as aforesaid, although the said underwear is not composed wholly of wool, but on the contrary, is composed partly of wool in varying percentages.

"That respondent did not create or originate the aforesaid custom or practice, but has been following the same in competition with and in like manner as followed by other underwear manufacturers throughout the United States as well as the underwear imported from foreign countries. That the following are the names of some of the said manufacturers of underwear in the United States, namely:

5 "Waterford Knitting Co., Waterford, New York.

"Hope Ktg. Co., Cohoes, New York.

"Faith Ktg. Co., Averill Park, New York.

"Wellsley Und. Co., Newton Lower Falls, Mass.

"Glastenbury Ktg. Co., Addison, Connecticut.

"Broadalben Ktg. Co., Broadalben, New York.  
"Clarke & Holesaply, Cohoes, New York.  
"Moore & Tierney, Cohoes, New York.  
"Wm. Moore Ktg. Co., Cohoes, New York.  
"Rob Roy Hosiery Co., Troy, New York.  
"Swansdown Ktg. Co., Hudson, New York.  
"Rock Run Mills, Goshen, Indiana.  
"Geo. H. McDowell Co., Cohoes, New York.  
"New England Ktg. Co., Winsted, Connecticut.  
"Geo. Rockwood & Co., Bennington, Vermont.  
"Black Cat, Bennington, Vermont.  
"H. E. Bradford & Co., Bennington, Vermont.  
"American Hosiery Co., New Britain, Connecticut.  
"Aetna Mills, Troy, New York.  
"J. W. Homes & Co., Waterford, New York.  
"Root Mfg. Co., Cohoes, New York.  
"A. V. Morris & Sons, Amsterdam, New York.  
"Atlas Ktg. Co., Amsterdam, New York.  
"Yund, Kennedy & Yund (wool sweaters), Amsterdam, New York.  
"Athens Textile Co., Athens, New York.  
"Bailey Ktg. Co., Ft. Plain, New York.  
"Gilbert Ktg. Co., Ft. Plain, New York.  
"Mechanicsville Ktg. Co., Mechanicsville, New York.  
"Lackawanna Mills, Scranton, Pennsylvania.  
"D. M. Collins Co., Pittsfield, Massachusetts.  
"Duofold Health Und. Co., Mohawk, New York.

"Elastic Spring Ktg. Corp., Mohawk, New York."

6 That a copy of said answer is annexed hereto, marked "Exhibit B" and made a part hereof.

IV. That thereafter and in order to facilitate the hearing before the Federal Trade Commission and because there could be little or no dispute of the matters involved the Federal Trade Commission, through its chief counsel, and your petitioner, through its counsel, entered into an agreed statement of facts, a copy of which is annexed hereto, marked "Exhibit C," and made a part hereof. That on or about the 29th day of January, 1920, the commission handed down a decision including findings as to the facts and conclusions of law and entered an order thereon, a copy of which is annexed hereto marked "Exhibit D," and made a part hereof.

V. That as findings of fact the said commission has found as follows: "That for more than a year last past the respondent in the sale and shipment of its products in interstate commerce as hereinbefore described has labeled, advertised, and branded certain lines of underwear as follows:

"Men's Natural Merino."

"Men's Gray Wool Shirts."

"Men's Natural Wool Shirts."

"Men's Natural Worsted Shirts."

"Men's Australian Wool Shirts."

7 "That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent; that the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; that the brands and labels used to mark the said articles named in paragraph three indicate same are composed wholly of wool, and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool.

"That for the past 20 years it has been a general custom and practice in the underwear business to label and brand underwear as 'Natural Merino,' 'Wool,' 'Natural Wool,' 'Natural Worsted,' and 'Australian Wool,' when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such."

That as a conclusion of law said commission has found as follows:

8 "From the foregoing findings, the commission concludes that the method of competition set forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'" And the said commission thereupon on the 29th day of January, 1920, made and has since served upon your petitioner the following order: "It is ordered, that the respondent, Winsted Hosiery Company, its officers, agents, representatives, servants and employees cease and desist from directly or indirectly employing or using the labels and brands "Wool," "Merino," and "Worsted," or any similar descriptive brands or labels on underwear, socks or other knit goods composed partly of wool, except either (1) when a knit fabric is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric, (e. g., Wool-and-Cotton; Worsted-and-Cotton; Wool Worsted-Merino and Cotton; Worsted, Cotton and Artificial Silk).

Respondent is further ordered to file a report in writing with the commission 3 months from notice hereof stating in detail the manner in which this order has been complied with and conformed to."

Your petitioner respectfully prays for an order of this court setting aside the findings of fact and the conclusion of law and  
9 the order of the Federal Trade Commission hereinbefore referred to for the following reasons:

First. On the ground that the agreed statement of facts does not support the finding of fact made by the commission in the following particular: That the finding of fact is "That the brands and labels

used to mark the said articles named in paragraph 3 indicate same are composed wholly of wool and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool" while the agreed statement of fact is as follows: "That the word "Merino" as known in the underwear trade, signifies a fabric composed of a mixture of wool and cotton" and that "such brands and labels (referred to in paragraph 3) may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool, when, in fact, they contain part cotton" and "that for the past twenty years it has been a general custom and practice in the underwear business to manufacture, label, advertise and brand underwear and such wearing apparel as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted" and "Australian Wool" when in fact such underwear so described is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served; that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein."

Second. On the ground that the conclusion of law, "That from the foregoing findings, the commission concludes that the method of competition set forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," is not warranted to be drawn from any and all of the findings as to the facts made by the commission. There is no finding of fact nor proof showing in what manner respondent's methods are unfair, nor that they were in any manner different from the methods of its competitors; and no finding of fact nor proof that the respondent sought to nor did obtain a single customer of its competitors; and no finding nor proof that any competitor of respondent suffered any injury through any practice or method of trade employed by the respondent. The only findings of fact made by the commission upon which it can be contended that this claim is based are

(a) "That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent; that the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel that the brands and labels used to mark the said articles named in paragraph three indicate same are composed wholly of wool, and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool."

(b) "That for the past 20 years it has been a general custom and practice in the underwear business to label and brand underwear as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such."

It therefore affirmatively appears and is found by the commission that the respondent is but following the universal practice of an industry and those pursued by its competitors throughout the United States.

Third. On the ground that the acts set forth in the findings of fact framed by the commission do not constitute a violation of what is known as the "Federal Trade Commission act." That no 12 unfair methods of competition are stated in said findings, but on the contrary, the commission has arbitrarily and in defiance of the universal practices of an industry stamped as "unfair method of competition" the use by the respondent of terms used in the same sense by like manufacturers and its competitors throughout the United States.

Fourth. On the ground that the commission in its conclusions of law that "the method of competition set forth is under the circumstances set forth, in violation of the provisions of section 5," etc. (i. e. "unfair") is in direct conflict with its findings of fact that "for the past 20 years it has been a general custom and practice in the underwear business to label and brand underwear as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such." That in characterizing the methods of the respondent as unfair, the commission has attempted to revolutionize, upset, and nullify the practices, methods and terms used not only by this respondent but universally by manufacturers in the same industry throughout the United States and by importers of similar goods from foreign countries.

13 That no unfair method of competition is involved in the question which the commission has assumed jurisdiction to pass upon, and decide herein. That axiomatically there can be no unfairness when the same terms, meaning the same things, are generally used by competitors of the respondent in the United States and the nomenclature followed by it is that generally used by the industry throughout the United States.

That the commission in the case at bar has substituted its own individual conception of the meaning of the words "unfair method



of competition" for the legal signification of the same words as employed in the said Federal Trade Commission act and has exceeded the powers granted to it by said act of Congress.

That no finding that the respondent has been guilty of pursuing any unfair method of competition is supported by any of the agreed upon facts. That in said agreed facts it appears that the word "Merino" as known in the underwear trade, signifies a fabric composed of a mixture of wool and cotton; that the word "Worsted" as known in the underwear trade, signifies a fabric which is not wholly composed of wool and may be composed in part of wool; that the use of the terms "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," in labeling, branding, and advertising underwear to describe underwear which is composed only in part of wool, is "general and universal" in the underwear trade throughout the United States and is followed by the manufacturers engaged therein; that underwear, imported into the United States in direct competition with the respondent and similarly composed in part of wool, has been and is labeled, branded and advertised as "Wool," "Merino," and "Worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States.

Wherefore, your petitioner prays for a review by this honorable court of the findings and the order of the said Federal Trade Commission, and for an order of this court directing the said commission to forthwith certify and file with the clerk of this court a transcript of the record of their proceedings therein to the end that this court may make an order herein that the findings and order of the said commission herein may be set aside, together with such other and further relief in the premises as may be just and equitable, and for this your petitioner will ever pray.

Dated March 19, 1920.

WINSTED HOSIERY COMPANY,  
By E. B. GAYLORD, *Treasurer*.

15 STATE OF CONNECTICUT,  
*County of Litchfield, ss.*

E. B. Gaylord, being duly sworn, deposes and says that he is the treasurer of Winsted Hosiery Company, the petitioner in the above proceeding; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge. That the reason why this verification is made by deponent and not by the petitioner is that the petitioner is a corporation and deponent is an officer thereof, to wit, its treasurer.

E. B. GAYLORD.

Sworn to before me this 19th day of March, 1920.

[SEAL]

ROBT M. ENSIGN,  
*Notary Public.*

16 EXHIBIT A COMPLAINT.

United States of America before Federal Trade Commission. Docket No. 214.

FEDERAL TRADE COMMISSION	}	
v.		
THE WINSTED HOSIERY COMPANY, respondent.		

Complaint in the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914, and notice of hearing thereof at the office of the Federal Trade Commission in the city of Washington, D. C., on the 28th day of December, 1918, at 10.30 o'clock a. m.

17 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss.*

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 30th day of October, A. D. 1918.

Present: William B. Colver, chairman: John Franklin Fort, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION	}	
vs.		
WINSTED HOSIERY COMPANY.		Docket No. 214.

Complaint in the matter of the alleged violation of section 5 of an act of Congress approved September 26, 1914.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that The Winsted Hosiery Company, hereinafter referred to as the respondent, has been and is

18 using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes." and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint, stating its charges in that respect, on information and belief as follows:

Paragraph one: That the respondent, The Winsted Hosiery Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, having its principal factory, office, and place of business located at the town of Winsted, in said State, and now and for more than one year last past

engaged in manufacturing and selling underwear throughout the States and Territories of the United States, and that at all times hereinafter mentioned respondent has carried on and conducted such business in competition with other persons, firms, copartnerships, and corporations similarly engaged.

Paragraph two: That the respondent, The Winsted Hosiery Company, in the conduct of its business, manufactures such underwear so sold by it in its factory located at the town of Winsted, State of Connecticut, and purchases and enters into contracts of purchase for the necessary component materials needed therefor in different States and Territories of the United States, transporting the same through other States of the United States in and to said town of Winsted, where they are made and manufactured into the finished product and sold and shipped to purchasers thereof; that after such products are so manufactured they are continuously moved to, from, and among other States and Territories of the United States and the District of Columbia, and there is continuously and has been at all times hereinafter mentioned a constant current of trade in commerce in said underwear between and among the various States of the United States, the Territories thereof, and the District of Columbia, and especially to and through the town of Winsted, State of Connecticut, and therefrom to and through other States of the United States, the Territories thereof, and the District of Columbia.

Paragraph three: That for more than one year last past, the respondent, Winsted Hosiery Company, with the purpose, intent and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has, in the conduct of its business manufactured and sold in commerce aforesaid, and labeled, advertised and branded certain lines of underwear composed of but a small amount of wool as

"Men's Natural Merino Shirts"

"Men's Gray Wool Shirts"

20 "Men's Natural Wool Shirts"

"Men's Natural Worsted Shirts"

"Australian Wool Shirts"

That such advertisements, brands and labels are false and misleading and calculated and designed to, and do, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool.

Therefore, notice is hereby given you, The Winsted Hosiery Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the Federal Trade Commission Building, Fifteenth and K streets, city of Washington, D. C., on the 28th day of December, 1918, at 10.30 o'clock in the forenoon of said day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

You will take notice that within thirty (30) days after the service of this complaint, you are required to file with the Federal Trade Commission an answer in conformity with Rule III of the Rules of Practice before the commission.

21 In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official seal to be affixed hereto at the city of Washington, D. C., this 30th day of October, A. D., 1918.

By the commission.

[SEAL.]

LEONIDAS L. BRACKEN,  
*Secretary.*

JOHN WALSH,  
*Chief Counsel for the Commission.*

22 EXHIBIT B ANSWER.

UNITED STATES OF AMERICA,  
*Before Federal Trade Commission.*

FEDERAL TRADE COMMISSION,	}	Docket No. 214. Answer.
<i>vs.</i>		
WINSTED HOSIERY COMPANY.		

The Winsted Hosiery Company, respondent herein, answering the complaint herein, alleges as follows:

Paragraph one: Admits the allegations set forth in paragraphs marked "Paragraph one" and "Paragraph two" of the complaint herein.

Paragraph two: Denies each and every allegation contained in paragraph marked "Paragraph third" of the complaint herein, except that the respondent admits that for more than one year last past it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labeled, advertised and branded certain lines of underwear as:

"Men's Natural Merino Shirts"

"Men's Gray Wool Shirts"

23 "Men's Natural Worsted Shirts"

"Australian Wool Shirts"

"Men's Natural Wool Shirts"

And respondent further admits that such underwear so manufactured and made are not composed wholly of wool.

For a further and separate defense to the complaint herein, respondent alleges as follows:

Paragraph third: That for the past twenty years and at the present time, it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted" and "Australian Wool," when such underwear so described is not composed wholly of wool, but on the contrary are composed only in

part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served; and further, that said general custom and practice has been and now is universal in the underwear trade throughout the United States and has been followed by all the manufacturers engaged therein; and further, that said general custom and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States.

Paragraph four: That for many years up to and including the present time, underwear has been in large quantities imported into the United States from foreign countries and the same have come into direct competition with the underwear manufactured in the mills throughout the United States; and further, that the underwear so imported into the United States has been and now is labeled, branded, and advertised as "Wool," "Merino," and "Worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States, as aforesaid, although the said underwear is not composed wholly of wool, but on the contrary, is composed partly of wool in varying percentages.

Paragraph five: That respondent did not create or originate the aforesaid custom or practice, but has been following the same in competition with and in like manner as followed by other underwear manufacturers throughout the United States as well as the underwear imported from foreign countries. That the following are the names of some of the said manufacturers of underwear in the United States, namely:

- Waterford Knitting Co., Waterford, New York.
- Hope Ktg. Co., Cohoes, New York.
- Faith Ktg. Co., Averill Park, New York.
- Wellsley Und. Co., Newton Lower Falls, Mass.
- Glastenbury Ktg. Co., Addison, Connecticut.
- Broadalben Ktg. Co., Broadalben, New York.
- Clarke & Holesapply, Cohoes, New York.
- Moore & Tierney, Cohoes, New York.
- Wm. Moore Ktg. Co., Cohoes, New York.
- Rob Roy Hosiery Co., Troy, New York.
- Swansdown Ktg. Co., Hudson, New York.
- Rock Run Mills, Goshen, Indiana.
- Geo. H. McDowell Co., Cohoes, New York.
- New England Ktg. Co., Winsted, Connecticut.
- Geo. Rockwood & Co., Bennington, Vermont.
- Black Cat, Bennington, Vermont.
- H. E. Bradford & Co., Bennington, Vermont.
- American Hosiery Co., New Britain, Connecticut.
- Aetna Mills, Troy, New York.
- J. W. Homes & Co., Waterford, New York.
- Root Mfg. Co., Cohoes, New York.
- A. V. Morris & Sons, Amsterdam, New York.

Atlas Ktg. Co., Amsterdam, New York.  
 Yund, Kennedy & Yund (wool sweaters), Amsterdam, New York.  
 Athens Textile Co., Athens, New York.  
 Bailey Ktg. Co., Ft. Plain, New York.  
 Gilbert Ktg. Co., Little Falls, New York.  
 Mechanicsville Ktg. Co., Mechanicsville, New York.  
 Lackawanna Mills, Scranton, Pennsylvania.  
 D. M. Collins Co., Pittsfield, Massachusetts.  
 Duofold Health Und. Co., Mohawk, New York.  
 Elastic Spring Kt. Corp., Mohawk, New York.

Wherefore, your respondent demands that the complaint herein be dismissed.

THE WINSTED HOSIERY COMPANY.  
 By RUDD, WOOD & MOLLOY, *Its Attorneys*.

26

## EXHIBIT C.—AGREED STATEMENT OF FACTS.

UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss.*

FEDERAL TRADE COMMISSION,	} Docket No. 214.
<i>v.</i>	
WINSTED HOSIERY COMPANY.	

## AGREED STATEMENT OF FACTS.

The Federal Trade Commission having issued and served its complaint herein, wherein it is alleged that it has reason to believe that the respondents have been using unfair methods of competition in interstate commerce in violation of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it would be to the interest of the public, and fully stating its charges in this respect, and the respondent, having entered its appearance by Wood, Molloy & France, its attorneys duly authorized to act in the premises, and having  
 27 filed their answer, and being desirous of expediting this proceeding and avoiding the time and expense incident to a hearing:

Now, therefore, it is stipulated and agreed by and between Claude R. Porter, chief counsel for the Federal Trade Commission, and Henry P. Molloy, counsel for the respondent, subject to the approval of the commission, that the following statement of facts is to be taken as the facts for this proceeding and shall be taken by the Federal Trade Commission as such and in lieu of testimony, and that said Federal Trade Commission shall proceed forthwith upon said agreed statement of facts to make and enter a report stating its findings as to the facts and issue an order disposing of this proceeding without the introduction of testimony in support of the same, and the parties hereby waive any and all rights they may have to require the introduction of such testimony.

Paragraph one: That the respondent, Winsted Hosiery Company, is a Connecticut corporation, with its principal office and place of business located at the town of Winsted, in said State, and has for several years been engaged in the manufacture and sale of certain lines of underwear, shirts, and other wearing apparel throughout the various States of the United States and has conducted such business in competition with other persons, firms, and corporations similarly engaged.

28 Paragraph two: That the respondent, Winsted Hosiery Company, in the conduct of its business manufactures such underwear, shirts, etc., so sold by it in its factory located at the town of Winsted, State of Connecticut, and purchases the necessary component materials needed therefor in different States of the United States, transporting the same through such other States of the United States in and to said town of Winsted, where same are manufactured into the finished product and sold and shipped to purchasers thereof; that after such products are so manufactured they are continuously moved to, from and among the different States of the United States, and there is continuously, and has been at all times hereinafter mentioned, a constant current of trade and commerce in said underwear, shirts, etc., between and among the various States of the United States.

Paragraph three: That the word "Merino" as known in the underwear trade, signifies a fabric composed of a mixture of wool and cotton.

Paragraph four: That the word "Worsted" as known in the underwear trade, signifies a fabric which is not wholly composed of wool and may be composed in part of wool.

Paragraph five: That for more than a year last past the respondent, in the sale and shipment of its products in interstate commerce as hereinbefore described, has labeled, advertised, and  
29 branded certain lines of underwear and shirts as:

"Men's Natural Merino."

"Men's Gray Wool Shirts."

"Men's Natural Wool Shirts."

"Men's Natural Worsted Shirts."

"Australian Wool Shirts."

Paragraph six: That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent. That the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; therefore, such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool when, in fact, they contain part cotton.

Paragraph seven: That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," when in fact such underwear so described is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served, that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as "All wool;" that large quantities of underwear and similar wearing apparel has been imported into the United States from foreign countries and it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, branded, and advertised as "Wool," "Merino," and "Worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but, on the contrary, is composed partly of wool in varying percentages.

CLAUDE R. PORTER,

*Chief Counsel for Federal Trade Commission.*

HENRY P. MOLLOY,

*Counsel for Respondent.*

ROBERT KANE,

*Counsel for Commission.*

Dated this                      day of                      , 1919.

31                      EXHIBIT D.—ORDER TO CEASE AND DESIST.

United States of America. Before Federal Trade Commission.  
Docket No. 214.

FEDERAL TRADE COMMISSION

v.

WINSTED HOSIERY COMPANY, RESPONDENT.

ORDER TO CEASE AND DESIST.

Entered by the commission at its office in the city of Washington, D. C., on the 29th day of January, 1920.

32                      UNITED STATES OF AMERICA.  
Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 29th day of January, A. D., 1920.



Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY.	

### REPORT, FINDINGS AS TO THE FACTS, AND CONCLUSIONS.

The Federal Trade Commission have reason to believe that the above-named respondent, Winsted Hosiery Company, has been for more than one year last past using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in that respect would be to the interest of the public and fully stating its charges in that respect; and the respondent having entered its appearance by its attorney duly authorized and empowered to act in the premises, and having filed its answer admitting that certain of the matters and things alleged in the said complaint are true in the manner and form therein set forth, and denying others therein contained, and thereafter having made and executed an agreed statement of facts, which has been heretofore filed, in which it is stipulated and agreed by the respondent that the Federal Trade Commission shall take such agreed statement of facts as evidence in this case and in lieu of testimony, and shall forthwith thereupon make its report stating its findings as to the facts, its conclusions, and its order disposing of this proceeding without the introduction of testimony or the presentation of argument; therefore the Federal Trade Commission now makes and enters this its report, stating its findings as to the facts and its conclusions:

#### FINDINGS AS TO THE FACTS.

Paragraph one: That the respondent, Winsted Hosiery Company is a Connecticut corporation, with its principal place of business located at the town of Winsted, in said State, and has for several years been engaged in the manufacture and sale of underwear, shirts, and other wearing apparel throughout the various States of the United States, and has conducted its business in competition with other persons, firms, and corporations similarly engaged.

Paragraph two: That the respondent, Winsted Hosiery Company, in the conduct of its business manufactures its products and sells and ships same to purchasers thereof located in different States of the United States; that after such products are so manufactured they

are continuously moved to, from, and among the different States of the United States, and there is continually, and has been at all times hereinafter mentioned, a constant current of trade and commerce in said products between and among the various States of the United States.

Paragraph three: That for more than a year last past the respondent in the sale and shipment of its products in interstate commerce as hereinbefore described has labeled, advertised, and branded certain lines of underwear as follows:

"Men's Natural Merino."

"Men's Gray Wool Shirts."

"Men's Natural Wool Shirts."

"Men's Natural Worsted Shirts."

"Men's Australian Wool Shirts."

35 Paragraph four: That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent; that the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; that the brands and labels used to mark the said articles named in paragraph three indicate same are composed wholly of wool, and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool.

Paragraph five: That for the past 20 years it has been a general custom and practice in the underwear business to label and brand underwear as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such.

#### CONCLUSIONS.

36 From the foregoing findings the commission concludes that the method of competition set forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

(Signed)

VICTOR MURDOCK, *Chairman*,  
HUSTON THOMPSON,  
WILLIAM B. COLVER,

*Commissioners.*

Dated this 29th day of January, A. D. 1920.

37 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 29th day of January, A. D. 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION	} Docket No. 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY.	

ORDER TO CEASE AND DESIST.

The Federal Trade Commission having issued and served its complaint herein, and the respondent, Winsted Hosiery Company, having entered its appearance by Wood, Molloy, and France, its attorneys, duly authorized and empowered to act in the premises, and  
 38 having filed its answer, and thereafter having made, executed, and filed an agreed statement of facts, in which it stipulated and agreed that the Federal Trade Commission should take such agreed statement of facts as the evidence in this case and in lieu of testimony, and proceed forthwith upon the same, and to make and enter its report stating its findings as to the facts, its conclusions, and its order without the introduction of testimony, and waiving therein any and all right to require the introduction of testimony or the presentation of argument in support of the same, and the Federal Trade Commission having made and entered its report stating its findings as to the facts and its conclusions that the respondent has violated section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," which said report is hereby referred to and made a part hereof.

Now, therefore, it is ordered that the respondent, Winsted Hosiery Company, its officers, agents, representatives, servants, and employees, cease and desist from directly or indirectly employing or using the labels and brands "Wool," "Merino," and "Worsted," or any similar descriptive brands or labels on underwear, socks, or other knit goods composed partly of wool, except either (1) when a knit fabric  
 39 is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric (e. g., Wool and Cotton; Worsted and Cotton; Wool, Worsted, Merino, and Cotton; Worsted, Cotton, and Artificial Silk).

Respondent is further ordered to file a report in writing with the commission three months from notice hereof, stating in detail the manner in which this order has been complied with and conformed to.

By the commission:

[SEAL.]

J. P. YODER, *Secretary.*

40 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss:*

FEDERAL TRADE COMMISSION	}	Docket No. 214.
<i>vs.</i>		
THE WINSTED HOSIERY COMPANY.		

CERTIFICATE.

I, J. P. Yoder, secretary of the Federal Trade Commission, certify that the following is a full, true, and correct transcript of the record in the above entitled proceeding, including the pleadings, agreed statement as to facts, the commission's report, findings as to the facts and conclusions, and orders therein; that this transcript is transmitted to the United States Circuit Court of Appeals for the Second Circuit pursuant to service upon the commission of a copy of a petition for review by Wood, Molloy & France, attorneys for the above-named respondent, on the 25th day of March, A. D., 1920.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed hereto, at the city of Washington, in the District of Columbia, this 22nd day of May, A. D., 1920.

J. P. YODER,  
*Secretary.*

41 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission held at its office in the city of Washington, D. C., on the 30th day of October, A. D., 1918.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION	}	Docket No. 214.
<i>vs.</i>		
THE WINSTED HOSIERY COMPANY.		

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF  
 THE ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914.

Whereas the Federal Trade Commission has reason to believe that The Winsted Hosiery Company has violated and is violating the provisions of section 5 of an act of Congress, approved September 26, 1914: Therefore be it

*Resolved*, That the commission issue and serve upon the said The Winsted Hosiery Company, its complaint, stating its charges in that respect in substantially the form hereunto annexed, and be it further

*Resolved*, That notice be given to the said The Winsted Hosiery Company as required by law, that the charges of said complaint will be heard by the commission at its office in the Federal Trade Commission Building, Fifteenth and K Streets, city of Washington, D. C., on the 28th day of December, 1918, at 10.30 o'clock in the forenoon of the said day or as soon thereafter as the same may be reached.

Adopted by the commission.

[SEAL.]

(Signed)

LEONIDAS L. BRACKEN,

*Secretary.*

42 UNITED STATES OF AMERICA

*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 30th day of October, A. D. 1918.

Present: William B. Colver, chairman; John Franklin Fort, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION

*vs.*

WINSTEAD HOSIERY COMPANY.

} Docket No. 214.

COMPLAINT IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF THE ACT OF CONGRESS, APPROVED SEPTEMBER 26, 1914.

The Federal Trade Commission, having reason to believe from a preliminary investigation made by it that The Winsted Hosiery Company, hereinafter referred to as the respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint stating its charges in that respect, on information and belief as follows:

Paragraph one: That the respondent, Winsted Hosiery Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, having its principal factory, office and place of business located at the town of Winsted, in said State, now and for more than one year last past engaged in manufacturing and selling underwear throughout the States and Territories of the United States, and that at all times hereinafter mentioned respondent has carried on and conducted such business in competition with other persons, firms, copartnerships and corporations similarly engaged.

Paragraph two: That the respondent, Winsted Hosiery Company, in the conduct of its business, manufactures such underwear so sold

by it in its factory located at the town of Winsted, State of Connecticut, and purchases and enters into contracts of purchase for the necessary component materials needed therefor, in different States and Territories of the United States, transporting the same through other States of the United States in and to said town of Winsted, where they are made and manufactured into the finished product and sold and shipped to purchasers thereof; that after such products are so manufactured, they are continuously moved to, from and among other States and Territories of the United States and the District of Columbia, and there is continuously and has been at all times herein-after mentioned, a constant current of trade in commerce in said underwear between and among the various States of the United States, the Territories thereof, and the District of Columbia, and especially to and through the town of Winsted, State of Connecticut, and therefrom to and through other States of the United States, the Territories thereof and the District of Columbia.

43 Paragraph three: That for more than one year last past, the respondent, Winsted Hosiery Company, with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has in the conduct of its business manufactured and sold in commerce aforesaid, and labeled, advertised, and branded certain lines of underwear composed of but a small amount of wool, as—

“Men’s Natural Merino Shirts.”

“Men’s Gray Wool Shirts.”

“Men’s Natural Wool Shirts.”

“Men’s Natural Worsted Shirts.”

“Australian Wool Shirts.”

That such advertisements, brands, and labels are false and misleading and calculated and designed to, and do, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool.

Therefore, notice is hereby give you, the Winsted Hosiery Company, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the Federal Trade Commission Building, Fifteenth and K Streets, city of Washington, D. C., on the 28th day of December, A. D., 1918, at 10.30 o’clock in the forenoon of said day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

You will take notice that within thirty (30) days after the service of this complaint you are required to file with the Federal Trade Commission an answer in conformity with Rule III of the rules of practice before the commission.

In witness whereof the Federal Trade Commission has caused this complaint to be issued, signed by its secretary, and its official seal

to be affixed hereto at the city of Washington, D. C., this 30th day of October, A. D. 1918.

By the commission.

[SEAL.]

(Signed)

LEONIDAS L. BRACKEN,

*Secretary.*

(Signed)

JOHN WALSH,

*Chief Counsel for the Commission.*

44 UNITED STATES OF AMERICA

*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 11th day of December, A. D. 1918.

FEDERAL TRADE COMMISSION

*vs.*

THE WINSTED HOSIERY COMPANY.

} Docket No. 214.

ORDER GRANTING EXTENSION OF TIME FOR FILING ANSWER.

*It is ordered*, upon application of counsel for respondent, that the time for filing answer to the complaint of the Federal Trade Commission, due December 5, 1918, be extended for a period of ten days to December 15, 1918.

[SEAL.]

(Signed)

L. L. BRACKEN,

*Secretary.*

45 UNITED STATES OF AMERICA

*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of December, A. D. 1918.

FEDERAL TRADE COMMISSION

*vs.*

THE WINSTED HOSIERY COMPANY.

} Docket No. 214.

ORDER GRANTING EXTENSION OF TIME FOR FILING ANSWER.

*It is ordered*, upon application of counsel for respondent, that the time for filing answer to the complaint of the Federal Trade Commission, due December 15, 1918, be extended for a period of thirty days to January 14, 1919.

[SEAL.]

(Signed)

L. L. BRACKEN,

*Secretary.*

46 United States of America.

Before Federal Trade Commission.

Docket No. 214.

Federal Trade Commission *v.* The Winsted Hosiery Company.

ANSWER.

47 United States of America,

Before Federal Trade Commission.

FEDERAL TRADE COMMISSION,	}	Docket No. 214.
<i>vs.</i>		
THE WINSTED HOSIERY COMPANY.		

The Winsted Hosiery Company, respondent herein, answering the complaint herein, alleges as follows:

Paragraph one: Admits the allegations set forth in paragraphs marked "Paragraph one" and "Paragraph two" of the complaint herein.

Paragraph two: Denies each and every allegation contained in paragraph marked "Paragraph third" of the complaint herein, except that the respondent admits that for more than one year last past it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labelled, advertised, and branded certain lines of underwear as—

"Men's Natural Merino Shirts."

"Men's Gray Wool Shirts."

"Men's Natural Worsted Shirts."

"Australian Wool Shirts."

"Men's Natural Wool Shirts."

And respondent further admits that such underwear so manufactured and made are not composed wholly of wool.

For a further and separate defense to the complaint herein, respondent alleges as follows:

Paragraph third: That for the past twenty years and at the present time, it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool," when such underwear so described is not composed wholly of wool, but on the contrary are composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served; and further, that said general custom and practice has been and now is universal in the



underwear trade throughout the United States and has been followed by all the manufacturers engaged therein; and further, that said general custom and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States.

Paragraph four: That for many years up to and including the present time, underwear has been in large quantities imported into the United States from foreign countries and the same have come into direct competition with the underwear manufactured in the mills throughout the United States; and further, that the underwear so imported into the United States has been and now is labelled, branded and advertised, as "Wool," "Merino," and "Worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States, as aforesaid, although the said underwear is not composed wholly of wool, but on the contrary, is composed partly of wool in varying percentages.

Paragraph five: That respondent did not create or originate the aforesaid custom or practice, but has been following the same in competition with and in like manner as followed by other underwear manufacturers throughout the United States as well as the underwear imported from foreign countries. That the following are the names of some of the said manufacturers of underwear in the United States, namely:

Waterford Knitting Co., Waterford, New York.  
 Hope Ktg. Co., Cohoes, New York.  
 Faith Ktg. Co., Averill Park, New York.  
 Wellsley Und. Co., Newton Lower Falls, Mass.  
 Glastenbury Ktg. Co., Addison, Connecticut.  
 Broadalben Ktg. Co., Broadalben, New York.  
 Clarke & Holesaply, Cohoes, New York.  
 Moore & Tierney, Cohoes, New York.  
 Wm. Moore Ktg. Co., Cohoes, New York.  
 Rob Roy Hosi. Co., Troy, New York.  
 Swansdown Ktg. Co., Hudson, New York.  
 Rock Run Mills, Goshen, Indiana.  
 Geo. H. McDowell Co., Cohoes, New York.  
 New England Ktg. Co., Winsted, Connecticut.  
 Geo. Rockwood & Co., Bennington, Vermont.  
 Black Cat, Bennington, Vermont.  
 H. E. Bradford & Co., Bennington, Vermont.  
 American Hosi. Co., New Britain, Connecticut.  
 Aetna Mills, Troy, New York.  
 J. W. Homes & Co., Waterford, New York.  
 Root Mfg. Co., Cohoes, New York.  
 A. V. Morris & Sons, Amsterdam, New York.  
 Atlas Ktg. Co., Amsterdam, New York.  
 Yund, Kennedy & Yund (Wool sweaters) Amsterdam, New York.  
 Athens Textile Co., Athens, New York.

Bailey Ktg. Co., Ft. Plain, New York.  
 Gilbert Ktg. Co., Little Falls, New York.  
 Mechanicsville Ktg. Co., Mechanicsville, New York.  
 Lacmawanna Mills, Scranton, Pennsylvania.  
 D. M. Collins Co., Pittsfield, Massachusetts.  
 Duofold Health Und. Co., Mohawk, New York.  
 Elastic Spring Kt. Corp., Mohawk, New York.

Wherefore, your respondent demands that the complaint herein be dismissed.

THE WINSTED HOSIERY COMPANY,  
 By RUDD, WOOD & MOLLOY,  
*Its Attorneys.*

49 UNITED STATES OF AMERICA  
*Before Federal Trade Commission, ss:*

FEDERAL TRADE COMMISSION	} Docket No. 214.
v.	
THE WINSTED HOSIERY COMPANY.	

#### AGREED STATEMENT OF FACTS.

The Federal Trade Commission having issued and served its complaint herein, wherein it is alleged that it has reason to believe that the respondents have been using unfair methods of competition in interstate commerce in violation of section 5 of an act of Congress, approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it would be to the interest of the public, and fully stating its charges in this respect, and the respondent, having entered its appearance by Wood, Molloy & France, its attorneys, duly authorized to act in the premises, and having filed their answer, and being desirous of expediting this proceeding and avoiding the time and expense incident to a hearing:

Now, therefore, it is stipulated and agreed by and between Claude R. Porter, chief counsel for the Federal Trade Commission, and Henry P. Molloy, counsel for the respondent, subject to the approval of the commission, that the following statement of facts is to be taken as the facts for this proceeding and shall be taken by the Federal Trade Commission as such and in lieu of testimony, and that said Federal Trade Commission shall proceed forthwith upon said agreed statement of facts to make and enter a report stating its findings as to the facts and issue an order disposing of this proceeding without the introduction of testimony in support of the same, and the parties hereby waive any and all rights they may have to require the introduction of such testimony.

Paragrap One: That the respondent, the Winsted Hosiery Company, is a Connecticut corporation, with its principal office and place of business located at the town of Winsted, in said State, and

has for several years been engaged in the manufacture and sale of certain lines of underwear, shirts, and other wearing apparel throughout the various States of the United States, and has conducted such business in competition with other persons, firms, and corporations similarly engaged.

50 Paragraph Two: That the respondent, the Winsted Hosiery Company, in the conduct of its business manufactures such underwear, shirts, etc., so sold by it in its factory located at the town of Winsted, State of Connecticut, and purchases the necessary component materials needed therefor in different States of the United States, transporting the same through such other States of the United States in and to said town of Winsted, where same are manufactured into the finished product and sold and shipped to purchasers thereof; that after such products are so manufactured they are continuously moved to, from, and among the different States of the United States, and there is continuously, and has been at all times hereinafter mentioned, a constant current of trade and commerce in said underwear, shirts, etc., between and among the various States of the United States.

Paragraph three: That the word "Merino" as known in the underwear trade, signifies a fabric composed of a mixture of wool and cotton.

Paragraph four: That the word "Worsted" as known in the underwear trade, signifies a fabric which is not wholly composed of wool and may be composed in part of wool.

Paragraph five: That for more than a year last past the respondent, in the sale and shipment of its products in interstate commerce, as hereinbefore described, has labeled, advertised, and branded certain lines of underwear and shirts as:

"Men's Natural Merino."

"Men's Gray Wool Shirts."

"Men's Natural Wool Shirts."

"Men's Natural Worsted Shirts."

"Australian Wool Shirts."

Paragraph six: That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent. That the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; therefore, such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool when, in fact, they contain part cotton.

51 Paragraph seven: That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise and brand underwear and such wearing apparel as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and Australian Wool," when in fact such underwear so de-

scribed is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served; that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as "All Wool"; that large quantities of underwear and similar wearing apparel has been imported into the United States from foreign countries and it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, branded and advertised as "Wool," "Merino," and "Worsted," underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but, on the contrary, is composed partly of wool in varying percentages.

(Signed)

CLAUDE R. PORTER,

*Chief Counsel for Federal Trade Commission.*

(Signed)

HENRY P. MOLLAY,

*Counsel for Respondent.*

(Signed)

ROBERT KANE,

*Counsel for Commission.*

Dated this 24th day of December, 1919.

## 52 UNITED STATES OF AMERICA,

*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 29th day of January, A. D. 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION

vs.

WINSTED HOSIERY COMPANY.

Docket No. 214.

## REPORT, FINDINGS AS TO THE FACTS AND CONCLUSIONS.

The Federal Trade Commission having reason to believe that the above-named respondent, Winsted Hosiery Company, has been for more than one year last past using unfair methods of competition in interstate commerce in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in that respect would be to the interest of the public and fully stating its charges in that respect; and the respondent having entered its appearance by

its attorney, duly authorized and empowered to act in the premises, and having filed its answer admitting that certain of the matters and things alleged in the said complaint are true in the manner and form therein set forth, and denying others therein contained, and thereafter having made and executed an agreed statement of facts which has been heretofore filed in which it is stipulated and agreed by the respondent that the Federal Trade Commission shall take such agreed statement of facts as evidence in this case and in lieu of testimony, and shall forthwith thereupon make its report stating its findings as to the facts, its conclusions, and its order disposing of this proceeding without the introduction of testimony or the presentation of argument; therefore the Federal Trade Commission now makes and enters this its report stating its findings as to the facts and its conclusions:

## FINDINGS AS TO THE FACTS.

Paragraph one: That the respondent, Winsted Hosiery Company, is a Connecticut corporation, with its principal place of business located at the town of Winsted, in said State, and has for several years been engaged in the manufacture and sale of underwear, shirts, and other wearing apparel throughout the various States of the United States, and has conducted its business in competition with other persons, firms, and corporations similarly engaged.

33 Paragraph two: That the respondent, Winsted Hosiery Company, in the conduct of its business manufactures its products and sells and ships same to purchasers thereof located in different States of the United States; that after such products are so manufactured they are continuously moved to, from and among the different States of the United States, and there is continually and has been at all times hereinafter mentioned a constant current of trade and commerce in said products between and among the various States of the United States.

Paragraph three: That for more than a year last past the respondent in the sale and shipment of its products in interstate commerce as hereinbefore described has labeled, advertised, and branded certain lines of underwear as follows:

"Men's Natural Merino,"

"Men's Grey Wool Shirts,"

"Men's Natural Wool Shirts,"

"Men's Natural Worsted Shirts,"

"Men's Australian Wool Shirts."

Paragraph four: That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent; that the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; that the brands and labels used to

mark the said articles named in paragraph three indicate same are composed wholly of wool, and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool.

Paragraph five: That for the past 20 years it has been a general custom and practice in the underwear business to label and brand underwear as "natural merino," "wool," "natural wool," "natural worsted," and "Australian wool," when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such.

#### CONCLUSIONS.

From the foregoing findings, the commission concludes that the method of competition set forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress, approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

(Signed) VICTOR MURDOCK,  
*Chairman.*  
HUSTON THOMPSON,  
WILLIAM B. COLVER,  
*Commissioners.*

Dated this 29th day of January, A. D. 1920.

54 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss.*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 29th day of January, A. D., 1920.

Present: Victor Murdock, chairman; Huston Thompson, William B. Colver, commissioners.

FEDERAL TRADE COMMISSION	} Docket No. 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY.	

#### ORDER TO CEASE AND DESIST.

The Federal Trade Commission having issued and served its complaint herein, and the respondent, Winsted Hosiery Company, having entered its appearance by Wood, Molloy and France, its attorneys, duly authorized and empowered to act in the premises, and having filed its answer and thereafter having made, executed and filed an

agreed statement of facts in which it stipulated and agreed that the Federal Trade Commission should take such agreed statement of facts as the evidence in this case and in lieu of testimony, and proceed forthwith upon the same, and to make and enter its report stating its findings as to the facts, its conclusions, and its order without the introduction of testimony, and waiving therein any and all right to require the introduction of testimony or the presentation of argument in support of the same, and the Federal Trade Commission having made and entered its report stating its findings as to the facts and its conclusions that the respondent has violated section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission to define its powers and duties, and for other purposes," which said report is hereby referred to and made a part hereof.

Now, therefore, it is ordered that the respondent, Winsted Hosiery Company, its officers, agents, representatives, servants, and employees cease and desist from directly or indirectly employing or using the labels and brands "Wool," "Merino," and "Worsted," or any similar descriptive brands or labels on underwear, socks, or other knit goods composed partly of wool, except either (1) when a knit fabric is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric (e. g., Wool-and-Cotton; Worsted-and-Cotton; Wool Worsted-Merino and Cotton; Worsted, Cotton, and Artificial Silk).

Respondent is further ordered to file a report in writing with the commission 3 months from notice hereof stating in detail the manner in which this order has been complied with and conformed to.

By the Commission:

[SEAL.]

(Signed)

J. P. YODER,

*Secretary.*

55

In the United States Circuit Court of Appeals,  
Second Circuit.

WINSTED HOSIERY COMPANY, PETITIONER. }

*vs.*

FEDERAL TRADE COMMISSION, RESPONDENT. }

No. 36.

RESPONDENT'S PETITION TO REMAND CASE FOR TAKING OF FURTHER  
EVIDENCE.

(Endorsed:) Prayer of petition granted. H. G. W. C. W. H.  
N. Y., Oct. 8, '20.

56

Comes now the respondent, Federal Trade Commission, by its acting chief counsel, Marvin Farrington, and respectfully moves the court to remand this case for the taking of further evidence



herein pursuant to that portion of section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, which reads as follows:

57 "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

and in support of its motion makes the following representation to this honorable court:

First. In December, 1918, the Federal Trade Commission filed its complaint against the Winsted Hosiery Company and fifteen other manufacturers engaged in similar business alleging a violation of section 5 of the act commonly referred to as the Federal Trade Commission act. Briefly stated, the charge was misbranding. The commission's preliminary investigation was initiated as a result of the prosecution by the United States District Attorney for the District of Columbia of one Moses Goldenberg for the alleged violation of the act of Congress approved May 29, 1916, which provides:

"That it shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever \* \* \* any false, untrue, or misleading statement, representation, or advertisement with the intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value. \* \* \*"

58 Second: Said Goldenberg had advertised in the Evening Star, a newspaper of general circulation in Washington, D. C., "Men's Winsted Mills Underwear, medium weight, Australian wool." A test of the garments so advertised, made by the U. S. Bureau of Standards, showed the same to contain 10% wool and 90% cotton.

Third: On the filing of the Company's answer, its attorneys, Rudd, Wood & Molloy (now Wood, Molloy & France) wrote the chief counsel that the company was not averse to marking their product according to its actual content, and suggested there would be no difficulty in arranging for a Stipulation of Facts thereby avoiding the necessity of extended hearings.

Fourth: Thereafter, said attorneys, Wood, Molloy & France, entered their appearances for twelve other respondents against whom the commission had filed complaints and filed answers in their behalf. In early October, 1919, Mr. H. P. Molloy, of said firm, came to Washington and with the attorney assigned by the commission to represent it, drafted a tentative stipulation of facts for use in said proceeding.



Fifth: On October 28, 1919, the Knit Goods Manufacturers of America, an association of which all concerns against whom the commission had filed complaints were members, held a meeting in Albany, N. Y., for the purpose of discussing generally the subject of branding and labeling underwear. No representative of the commission was present at that meeting. Mr. Molloy was present. Such proceedings were had by said manufacturers at that meeting that a committee was appointed to consider the practices complained of in the commission's complaints. That committee was composed of representatives of leading manufacturers and distributors in the United States, including the Winsted Hosiery Company. On November 12, 1919, that committee made a full report on the subject of underwear labeling, a true copy of which is attached hereto as Exhibit A. On November 17, said law firm sent the chief counsel a copy of said committee's report and suggested a date be fixed for concluding the proposed stipulation of facts.

Sixth: Thereafter said stipulation was concluded but not signed until January 24, 1920. On January 3, 1920, a draft of the order was prepared by the attorney in charge and forwarded to said law firm and to the chairman of the committee appointed by the manufacturers, Mr. Lincoln Cromwell. The latter responded suggesting word "Merino" on labels for mixed cotton and wool underwear unless followed by the words "wool and cotton." The order was thereupon redrawn in accordance with such suggested changes and a copy of this redraft of order was sent said law firm January 14th. The order thereafter entered by the commission in all sixteen proceedings is so similar to that suggested by said chairman as to be in substance identical.

Seventh: On divers occasions prior to the entry of said order informal conferences were held by one of the commissioners, the attorney in charge, said chairman and Mr. Molloy.

Eighth: Shortly subsequent to the entry of said orders, said Chairman Cromwell in writing informed the commission that: "To the best of my information all of the manufacturers of wool and cotton mixed underwear who have used the word 'Merino' have with a single exception abandoned the use of the word 'Merino,' and I feel as strongly as ever that the word 'Merino' should not be permitted unless followed by the words 'wool and cotton' to prevent possibility of misunderstanding by the consumer."

Ninth. No petition for a review of any of the orders entered against said manufacturers, save the Winsted Hosiery Company, has been filed in any United States Circuit Court of Appeals.

Tenth. Your petitioner further represents that the Winsted Hosiery Company, petitioner in this court, and the New England Knitting Company are engaged in similar lines of business; are located in the same city; are controlled by the same property interests; the former sells to the large retail trade; the latter to the wholesale or jobbing trade. Since the entry of the commission's

order it has been informed that the largest customer of the New England Knitting Company in all purchases of its products that bear labels with the word "Merino" thereon now requires that the words "wool and cotton" be also placed on all such labels.

Eleventh. The whole reason why the proceeding took the course of an agreed statement of facts instead of trial was that the entire industry, including this petitioner, conceded in principle what was the whole basis of the proceeding, namely, that the use of its labels

62 should be changed because of the reasonable probability of their leading the purchasing public to believe that its products were wool when they contained twenty to eighty per cent of cotton. Unless this were conceded, obviously there was no standing for the proceeding; it had either to be proved or admitted. The commission understood that the Winsted Hosiery Company admitted it, and the method of an agreed statement of facts was adopted by both sides to eliminate the expense incident to a trial.

Twelfth. The sufficiency of the stipulation of facts as to the misleading of the public is now challenged by the petitioner, to the great surprise of the commission, although, as stated, the commission was led to believe that it conceded its labels might mislead the purchasing public.

Thirteenth. To remove any possible doubt, therefore, of a technical defect in the stipulation of facts, the commission desires to avail itself of the provisions of Section 5 of its organic act hereinbefore quoted.

Wherefore, the respondent herein respectfully moves the court to remand this case to the Federal Trade Commission for the purpose of introducing evidence showing or tending to show that the  
63 labels used by the Winsted Hosiery Company, embraced in the commission's order, do mislead the ultimate consumer; and evidence concerning the attitude of the great majority of manufacturers in the industry in condemning the use of the word "Merino" without the use of the explanatory words "wool and cotton" as misleading.

FEDERAL TRADE COMMISSION.

By MARVIN FARRINGTON,

*Acting Chief Counsel.*

JAMES T. CLARK, *Attorney.*

64

EXHIBIT A.

NOVEMBER 12, 1919.

REPORT OF THE COMMITTEE ON UNDERWEAR LABELING TO THE KNIT  
GOODS MANUFACTURERS OF AMERICA.

GENTLEMEN: Your committee has carefully considered the complaint of the Federal Trade Commission that a number of the most

reputable American manufacturers of underwear are using descriptive words on their labels which are likely to mislead the public as to the quality of the underwear. We have received complete lists of the labels complained of, and we have made a wide inquiry among other manufacturers, as well as among retail and wholesale dealers as to the underwear labels in use. We find that all of the descriptive terms complained of by the Federal Trade Commission have been used on the labels for the same underwear for a number of years, in some cases for nearly half a century, and that these products are to-day among the most popular and respected in the country, showing beyond question that these manufacturers have kept their customers through the intrinsic value of their products which the consumer has worn, and not through wordings on labels of boxes usually left in the retail store.

Neither the jobber nor the retailer buys his underwear under the influence of box labels. Samples are not shown in boxes. They carry only our price tickets. With the underwear manufacturer the label has been an afterthought, because it played no part in his selling. Your committee believes that the Federal Trade Commission exaggerated the influence which labeling on underwear boxes can have under the American system of retail selling where reputable stores practically warrant the value of all goods sold. We are, however, so jealous of the fair name of our industry, and of our individual reputations for fair dealing, that we have considered this complaint in the broadest way with the sole object of freeing the industry from any abuses which may have been made of our labels by dealers over whom we have no control, because of words used on the labels which meant one thing to the manufacturer and the dealer, but were capable of being misunderstood by the public.

It is fair to suppose that the public will assume that any word on a label carries the meaning given in one of the standard dictionaries. We have taken the definitions in the Century, the Standard, the International, and Worcester's dictionaries of all the words complained of, including *wool*, *natural wool*, *woolen*, *merino*, *woolen merino*, *worsted*, *cashmere*, *camel hair*, and basing our suggestions on these dictionary meanings rather than upon any understanding of them by manufacturers and dealers, we offer the following table of descriptive terms, setting opposite each class of underwear three lists of descriptive terms now used to describe it on box labels. In the first list are words which are not only beyond any chance of criticism, but are approved by the experience of many large distributors. They limit the label to its simplest terms, such as the mill name, the brand name, and the word undershirt, union suits, etc., with the color, size, and quantity, and define the quality in exact terms, such as "Wool Underwear" or "Worsted Underwear," both meaning *all wool* knitted fabrics. In the second list is a set of words which are clearly permissive under the dictionary definitions, and while they are not so definite as the first list,

we see no reason why mills using them should change their labels. The third list contains words which we believe are properly complained of because they could be used by an ignorant or dishonest clerk to deceive a customer as to the material content of the underwear.

67 Materials used.	Recommended label words.	Permissive label words.	Improper label words.
All wool, carded stock.	(1) Featuring only the mill, as Howard Knitting Company, Men's Undershirts. Gray mixed. (2) Featuring only the brand, as Crescent Brand Men's Undershirts. Gray mixed. (3) Featuring only this season, as Men's Winter Underwear Shirts. White. (4) Featuring only the weight, as Men's Heavy Weight Underwear Shirts. Camel hair color. Men's Wool Underwear Shirts. Men's Worsted Underwear Union Suits.		
All wool, combed yarns.			
Worsted Merino, yarn only.	Men's Worsted Merino Ribbed Union Suits. Men's Merino Ribbed Shirts.		
Worsted and cotton yarns.	Worsted and Cotton Ribbed Undershirts.	Worsted Shirts. Worsted Suits.	Worsted Underwear. Worsted Underwear.
68 Worsted merino and cotton yarns.	Worsted Merino and Cotton Union Suits.	Merino Suits.	
Worsted silk and cotton yarns.	Worsted and Cotton Ribbed Underwear silk striped.		
Wool and cotton....	Same as 1, 2, 3 and 4 or Men's Wool and Cotton Underwear Shirts.	Woolen Underwear.  Merino Underwear.	Wool Underwear. Worsted Underwear. Natural Wool Underwear. Camel Hair Underwear. Flat Wool Underwear. Wool Ribbed Underwear. Fine Wool Shirts. Natural Gray " Scotch Wool. Persian Wool. Australian Wool. Lamb's Wool. Persian Fleece. Saxony Wool. Natural Mixed Wool. Fine Natural Vests. Natural Merino.

Underwear made of, or striped with, artificial silk, or mercerized cotton, must not be labeled silk or silk striped, but carry on them the words artificial silk or mercerized cotton as the case may be. "Silkeline" or "Silkateen" are trade words and are not recommended as describing mercerized cotton.

All wool, and wool and cotton mixed underwear made partly of genuine camel hair, or of Australian wool, etc., may properly have on the labels the words "Contains Genuine Camel Hair," or "Made Partly of Australian Lamb's Wool." Only if the fabric contains no dyed stock and is all wool may the words "Natural wool" be used on the labels. Colors are best described by gray, gray mixed, camel hair color, blue random, white, scarlet, etc.

## COTTON UNDERWEAR.

The chief criticism of cotton underwear labeling has been over the word Egyptian applied to fabrics dyed in imitation of Egyptian cotton. Some of these labels could easily be read as a warranty that the underwear was made of genuine Egyptian cotton. Where the contents is a dyed fabric the word Egyptian should never appear on the box label unless joined with the word color.

69 "French Balbriggans" appears on many labels of summer underwear made in America. It may fairly be argued that these words are so commonly understood to describe a class of underwear without any reference to the country of origin that no man would go home believing that these balbriggans were imported any more than he would suppose the French pastry on the bill of fare was baked in France. But balbriggan underwear (in negligible quantities at present) is imported from France, and as we shall demand of the Federal Trade Commission that imported underwear shall be labeled in strict accordance with the rules made for American manufacturers, we advise that the word French be dropped from the labels and stamping of all American-made balbriggan.

Your committee can not too strongly state its belief that the Federal Trade Commission was not warranted in publishing charges against underwear manufacturers without first giving them a hearing, and that these charges should be publicly withdrawn so far as they imply any intentional wrongdoing on the part of the manufacturers cited. The labels complained of have played no part in our sale of the goods; but as we would not permit our own salesmen to misrepresent our products, we must use every care to prevent others from misrepresenting them to the consumer. It is not necessary for us to believe that our labels have misled a single consumer. We want them to be exact beyond any misunderstanding.

Your committee believe that the label changes recommended above are in the best interest of the industry, and that your committee should be authorized to file a copy of this report with the Federal Trade Commission as representing the attitude of this association and of its members, and that the committee be authorized to appear personally before the commission if requested to make any further explanations. It is further recommended that a copy of this report should be sent to the National Association of Dry Goods Jobbers, so that its members should have our action in mind when ordering the labels which they furnish manufacturers, pending final action on this matter by the Federal Trade Commission.

Mr. Lincoln Cromwell, chairman, Wm. Iselin & Co., N. Y. C.

Mr. James H. Shine, Hope Ktg. Company, Cohoes, N. Y.

Mr. William Tierney, Moore & Tierney, Cohoes, N. Y.

Mr. L. R. Breslin, Waterford Ktg. Co., Waterford, N. Y.

Mr. E. B. Gaylord, Winsted Hosiery Co., Winsted, Conn.

Mr. Bernard L. Connell, Lackawanna Mills, Scranton, Pa.

Mr. Frank H. Burgher, Bliss, Fabyan & Co., New York City.

Mr. Oscar W. Gridley, Utica Ktg. Co., Utica, N. Y.

70 United States Circuit Court of Appeals for the Second Circuit.

WINSTED HOSIERY COMPANY, PETITIONER,	}	No. 36.
vs.		
FEDERAL TRADE COMMISSION, RESPONDENT.		

## ANSWERING THE APPLICATION TO REPUDIATE STIPULATION.

71 I. The Federal Trade Commission asks to be relieved of the effect of a stipulation as to the agreed-upon facts, mutually arrived at after conference and after careful and mature consideration. It does this after the petition for review has been filed in this court for more than seven months, when the cause is about to be reached for argument and after it has had in its hands for more than two weeks the brief of the petitioner. It asks:

1st. To be permitted to introduce evidence showing or tending to show that the labels used by the petitioner do mislead the ultimate consumer;

2nd. To introduce evidence concerning the attitude of the great majority of manufacturers in the industry in condemning the use of the word "Merino."

II. The Federal Trade Commission in arriving at the agreed statement of facts, made the following stipulation:

"Now, therefore, it is stipulated and agreed by and between  
72 Claude R. Porter, chief counsel for the Federal Trade Commission, and Henry P. Molloy, counsel for the respondent, subject to the approval of the commission, *that the following statement of facts is to be taken as the facts for this proceeding and shall be taken by the Federal Trade Commission as such and in lieu of testimony*, and that said Federal Trade Commission shall proceed forthwith upon said agreed statement of facts to make and enter a report stating its findings as to the facts and issue an order disposing of this proceeding without the introduction of testimony in support of the same, *and the parties hereby waive any and all rights they may have to require the introduction of such testimony.*"

Upon item first the stipulation is—

"That the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; therefore, such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool when, in fact, they contain part cotton."

This fact was agreed upon after most careful examination, without fraud, collusion, mistake, accident, or surprise. The original form in which this clause was *proposed and submitted* to the petitioner *by the commission* was:

"That the brands and labels used to mark the said articles named in paragraph three indicate same are composed wholly of wool and thereby the purchasing public is led to believe the said articles branded and labeled as aforesaid are composed wholly of wool.

That the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel."

Your petitioner and the respondents in the related cases would not agree to any such alleged fact. Thereupon after conference and extended consideration by all the parties the present form of agreed fact was drawn and accepted.

The claim of surprise must therefore be stamped as unsound and untrue.

Upon item second the stipulation is:

"That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as "Natural Merino," "Wool," "Natural Wool," "Natural Worsted," and "Australian Wool." when in fact such underwear so described is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served, that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as "All Wool;" that large quantities of underwear and similar wearing apparel has been imported into the United States from foreign countries and it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, branded, and advertised as "Wool," "Merino," and "Worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but on the contrary, is composed partly of wool in varying percentages."

The commission now seeks to nullify its stipulation, which was the absolute fact when the stipulation was signed, and asks that it may show the attitude of the great majority of manufacturers condemning the use of the word "merino." In support thereof it says that your petitioner is the only one which has sought a review of the matter and that all others have abandoned the use of the word "merino." Your petitioner's attorneys represented the other respondents before the commission and it was only necessary for one to assume the expense of testing the validity of the commission's act in



this court. Because the other respondents have, like law-abiding citizens, obeyed the commission's order until it shall have been vacated, is no basis for the construction which has been placed upon their acts. Having attempted to intimidate an industry, the commission desires to prove what it claims are the changed and present views of that industry. This amounts to nothing less than an exercise of power by a great Federal tribunal to force a change of opinion and then use that opinion obtained by duress to sustain its original finding. Nothing can be imagined which is more in conflict with every sense of fairness and justice.

75 The petitioner herein calls special attention to the statement of counsel for the trade commission found in his letter of February 19, 1920:

"It was upon the stipulation as changed and rewritten by you that the commission made its findings and issued its orders."

And again in his letter of February 24, 1920:

"The commission never issues an order or makes a report stating its findings as to the facts until there is evidence to support the same."

Having made its order upon the record in this case the commission now opposes its review, disclaims its stipulation, and tacitly admits it acted on alleged facts not found in the record.

III. This petitioner, as well as the respondents in similar cases, of its own accord, was willing to abide by the report and recommendation of the industry, dated November 12th, 1919, a copy of which is attached to the moving papers. That recommendation provided for and approved the use of the term "merino" just as it has been used by this petitioner and the industry for decades. It represented the universal view and practice of an industry.

The general convention of manufacturers of knitwear which prepared and adopted the report which has been referred to, unanimously adopted the following resolutions which completely answer the pretense of the commission that there was acquiescence with its action and procedure:

"Whereas, the Federal Trade Commission has instituted proceedings under the act of Congress approved September 26th, 1914, against substantially all the manufacturers of woolen underwear in the United States, wherein it is claimed and alleged by the Federal Trade Commission that the several manufacturers are, with the purpose, intent, and effect of stifling and suppressing competition  
76 in the manufacture and sale of underwear in interstate commerce, labeling, advertising, and branding certain lines of underwear composed of but a small amount of wool as Merino, Cashmere, Worsted, and Wool Underwear, and that such advertisements, brands, and labels are false and misleading and calculated and designed to and do, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool; and



"Whereas, for the past fifty years and upwards it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as Merino, Cashmere, Worsted, and Wool Underwear when in fact such underwear so described is not composed wholly of wool but is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served, and further that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by the manufacturers engaged therein, and further that large quantities of underwear have been imported into the United States from foreign countries that come into direct competition with the underwear manufactured in the mills throughout the United States and which underwear so imported into the United States has been and now is labeled, branded, and advertised as Merino, Cashmere, Worsted, and Wool Underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool but on the contrary is composed partly of wool in varying percentages; and

"Whereas, the said trade custom and practice is well known and understood by all the underwear manufacturers, jobbers, retailers, and consumers as well as each and every purchasing agent of underwear of the several departments of the United States Government; and

"Whereas, the several manufacturers against whom proceedings have been instituted by the Federal Trade Commission have met in conference for the purpose of discussing the said claims of the Federal Trade Commission and by an exchange of their several opinions determine for themselves a course of action to take in answering and defending the complaints of the Federal Trade Commission in the several proceedings; now after full consideration of the subject matter, it is

"*Resolved*, That it is the sense of this conference that the general custom and practice followed by each of the manufacturers in labeling and branding underwear manufactured by them as Merino, Cashmere, Worsted, and Wool Underwear, when in fact such underwear so described is not wholly composed of wool but is composed in part of wool, varying in the percentage thereof to meet the varying demands of the trade solicited and served by them, is not done with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear, and that such brands and labels are not false and are not misleading and not calculated  
 77 and not designed to, and do not, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool and which fact is universally known and understood by the manufacturers, jobbers, retailers, and consumers of underwear throughout the United States and elsewhere; and further

"*Resolved* That it is the sense of each and every manufacturer present at this conference that the welfare of the underwear industry makes it necessary and advisable to answer and defend the proceedings brought against them respectively by the Federal Trade Commission, to the end that the charge that they and each of them have been and are practicing any unfair methods of competition or deception to the public be effaced from the records."

It thus appears that practically all the manufacturers in the industry involved took the position which has been defended in this proceedings and that the inferences attempted to be drawn and the innuendoes thrown out by counsel for the commission are unfounded.

Certainly the alleged opinion of Mr. Cromwell contrary to the report which alone he was authorized to submit can not be seriously considered by this court as ground for granting the present request of the commission. On its own showing it had that opinion of Mr. Cromwell when it made the stipulation which it would now repudiate.

IV. The statement in the petition "that the largest customer of the New England Knitting Company in all purchases of its products that bear labels with the word 'Merino' thereon now requires that the words 'wool and cotton' be also placed on all such labels" is untrue, and the petitioner is at loss to understand who could have made such an absolutely false statement to it.

V. The present application is on a par with other acts of the commission in this case. Your petitioner and the respondents never had a fair hearing in this case before the commission  
78 itself. That is shown by the correspondence attached hereto.

Now the commission intends if possible to prevent a review of the facts and findings upon which it has acted and make a new case after it has harassed an industry and hopefully expects it has got that industry in a frame of mind where it will acquiesce in everything the commission demands.

VI. The application of the Federal Trade Commission should be denied and the review of its action proceed upon the record upon which it acted.

Dated October , 1920.

WOOD, MOLLOY & FRANCE,  
*Attorneys for Winsted Hosiery Company.*

79

FEBRUARY 16, 1920.

Re docket Nos. 214, et al.  
FEDERAL TRADE COMMISSION,  
*Washington, D. C.*

GENTLEMEN: We were astounded to receive this morning copies of order to cease and desist in dockets 214, 346, 406, 407, 408, 410, 412, 417, 418, 420, 421, and 423.

The respondents in these cases, manufacturers of high repute and standing in a great industry, had endeavored to meet the commission

on a common basis of fairness and justice, notwithstanding what they believed was the unwarranted fashion in which they were hailed before your body. On many matters they were willing to meet the objections of the complaint lodged by the commission but upon some, which involved the use of names and terms which had been employed for half a century or more and about which there was not the slightest question or uncertainty in the hosiery and knitwear industries, they desired to be heard. To facilitate such a hearing they were willing to enter into agreements stipulating the facts about which there could be little dispute.

Acting for the respondents, we signed proposed agreed statements of facts in the above cases about the 19th of January this year and awaited the approval and return of the same with the signature of the chief counsel of the trade commission. On February 4th, 1920, we received the same from the counsel of the commission with a letter dated February 3rd, 1920.

Upon their receipt we started to prepare our brief for submission to the commission. Our Mr. Molloy when in Washington on the 19th of January in conference with Mr. Kane, who was in charge of these cases, had stated that he had desired to present his argument to your body particularly upon the use of the word "Merino." Our Mr. France while in Washington on February 13th, 1920, called at your office to inquire, among other things, within what time the brief was to be submitted. Mr. Kane, whom he first saw, stated that it was news to him that any briefs were to be submitted and for the first time the attorneys for the respondents learned, in Mr. Kane's words, that the cases were "in the bosom of the commission." Mr. France stated that the respondents desired to be heard and thereupon Mr. Kane and he visited Commissioner Thompson. The matter was informally discussed by them before Mr. Thompson and Mr. France was given permission by the commissioner to submit a brief within the next week or ten days. Nothing was then said that the cases had already been decided on January 29th, two weeks before and nearly a week prior to the receipt by the respondents' attorneys of the signed agreements of fact.

We are frank to say that we have never before experienced any like treatment from any court, commission or representative of the Federal Government. It requires no comment, no characterization; it speaks for itself.

Under the statute the commission, of course, may modify or set aside its order upon notice, etc. We feel that we are absolutely entitled to such relief from the commission. Under the basic Anglo-Saxon principle that every man is entitled to a hearing and shall not be found against without that opportunity, we should have it.

In the cases under consideration we have been treated neither justly nor fairly. If the treatment which has been accorded us has been accidental it is most unfortunate in the impression it has created; if intentional, it is most reprehensible.

We therefore ask for the setting aside of the orders to cease and desist and an opportunity to prepare and present our brief to the commission so it may not be said that a great body of representative manufacturers have been foreclosed of a hearing and the universally accepted customs and terms of an important industry stamped as improper without due course of law by a governmental agency.

Yours, very truly,

WOOD, MOLLOY & FRANCE.

MJF:I

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FEDERAL TRADE COMMISSION,  
OFFICE OF THE CHIEF COUNSEL,  
*Washington, February 19, 1920.*

In re docket 214 et al.

MESSRS. WOOD, MOLLOY & FRANCE,  
*25 Broad Street, New York, N. Y.*

GENTLEMEN: Your communication of the 16th instant comes to me as a great surprise. I am sure it was the understanding of the commission that the agreed statement of facts entered into definitely disposed of the proceedings before it.

You and Mr. Lincoln Cromwell conferred informally with the commission on December 6, 1919, and at this conference, as I understood it, it was agreed that an order should be entered in these proceedings. It was also stated at that time that you and the commission's attorney would draw up the necessary papers. At the conclusion of this conference you were handed a Statement of the Facts prepared by the commission's attorney. You took these stipulations with you for consideration and for submittal to your clients.

These stipulations were redrafted by you and returned to the chief counsel's office on December 22, 1919. It was upon the stipulation as changed and rewritten by you that the commission made its findings and issued its orders.

It was further understood before the commission issued any orders in these proceedings it would submit to Mr. Lincoln Cromwell and to you a copy of its proposed order to cease and desist. This was done. Mr. Cromwell suggested certain changes in the order. Thereupon Mr. Cromwell was invited to confer with the commission relative to his suggested changes. Mr. Cromwell, pursuant to the commission's invitation, did come to Washington to confer, with the result that the changes suggested by him were adopted by the commission, and the order entered in these cases was almost in the exact language as that used by Mr. Cromwell. A copy of this order was then furnished you. The commission received no further statement from

you concerning it other than through Mr. Kane, to whom you stated some five of your clients would appeal in the event the commission included the word "Merino" in its order.

The first intimation that came to the commission or this office that you desired to file a brief and be heard before the commission was

when your Mr. France was here on the 16th instant. Mr. Kane, not knowing to what stage these proceedings had advanced, stated to Mr. France that he was not precluded from filing a brief.

Now that the orders have been issued in these proceedings, you, of course, have a right to file a motion to modify or set aside same. If you desire to avail yourselves of this right you may do so, and I will arrange an early date for you to be heard on your motion before the commission.

Respectfully,

CLAUDE R. PORTER,  
*Chief Counsel.*

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FEBRUARY 21, 1920.

In re Docket 214 et al.

Hon. CLAUDE R. PORTER,

*Chief Counsel Federal Trade Commission,  
Washington, D. C.*

DEAR SIR: We are in receipt of yours of February 19th. We had thought that under the circumstances outlined in our letter of the 16th the commission would of its own motion set aside the orders entered herein. That apparently was a futile thought. The commission has evidently finally determined its report, having reached its conclusion prior to any agreement upon the facts. (See notation of date at upper left hand corner of findings, 12-15-19). The commission having thus prejudged the case, we feel that any motion by us, as suggested in your letter, would be wasted effort, and that our appropriate remedy is to pursue the method of review provided in the statute. We shall, therefore, take steps to present the necessary petitions to the Circuit Court of Appeals for the Second Circuit.

Yours, very truly,

WOOD, MOLLOY & FRANCE.

MJF/HS.

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FEDERAL TRADE COMMISSION,  
*Washington, February 24, 1920.*

Docket 214 et al.

WOOD, MOLLOY & FRANCE,

*25 Broad Street, New York City.*

GENTLEMEN: This is to acknowledge receipt of your communication of the 21st inst., stating that you did not desire to avail yourself of the right to make a motion before the commission that certain of its orders in the above proceedings be modified or set aside, but, that, on the contrary you would petition the Court of Appeals for the Second Circuit to review said orders, as provided in the act.

With reference to your statement that the commission prejudged these cases, and made its report prior to entering into the agreed statement of facts, I desire to state that you are entirely in error.

The commission never issues an order or makes a report stating its findings as to the facts until there is evidence to support same.

Respectfully,

FEDERAL TRADE COMMISSION,  
CLAUDE R. PORTER,  
*Chief Counsel.*

86 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, city of New York, on the 18th day of October, 1920.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, circuit judges.

WINSTED HOSIERY COMPANY, PETITIONER, }  
v. }  
FEDERAL TRADE COMMISSION, RESPONDENT. }

A motion having been made herein by counsel for the respondent to remand this proceeding for the purpose of taking further testimony;

Upon consideration thereof it is

Ordered that said motion be and hereby is granted, the respondent to have 90 days from the date hereof within which to take such evidence. H. G. W., C. M. H.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Winsted Hosiery Co. v. Federal Trade Commission. Order. United States Circuit Court of Appeals, Second Circuit, Filed Oct. 18, 1920. William Parkin, clerk.

87 United States Circuit Court of Appeals for the Second Circuit.

WINSTED HOSIERY COMPANY, PETITIONER, }  
vs. } No. 36.  
FEDERAL TRADE COMMISSION, RESPONDENT. }

REPORT AND NEW AND MODIFIED FINDINGS AND RECOMMENDED MODIFICATION OF ORDER.

88 The petitioner, Winsted Hosiery Company, having filed in this court, under the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," a written petition for review of an order issued by the Federal Trade Commission, the respondent herein, directing the petitioner to cease and desist from the use of certain labels on underwear manufactured by it, and the Federal Trade Commission, under another provision of said act, having applied to this court for leave

to adduce additional evidence and such leave having been granted by an order dated October 18, 1920, as follows: "A motion having been made herein by counsel for the respondent to remand this proceeding for the purpose of taking further testimony; upon consideration thereof it is ordered that said motion be and hereby is granted the respondent to have 90 days from the date hereof within which to take such evidence"; and additional evidence having been taken by respondent in pursuance of said order, now the respondent, the Federal Trade Commission, makes return of such additional evidence to this court and files therewith its modified and new findings of facts and its recommendation for the modification of its original order, as hereto attached.

By the Commission.

HUSTON THOMPSON,  
*Chairman.*

Dated this 14th day of January, A. D. 1921.

Attest:

J. P. YODER,  
*Secretary.*

89 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of January, A. D. 1921.

Present: Houston Thompson, chairman; Nelson B. Gaskill, Jno. Garland Pollard, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION	} Docket 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY.	

REPORT AND MODIFIED AND NEW FINDINGS AS TO THE FACTS AND  
CONCLUSIONS.

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance by its attorneys, and filed its answer herein, a statement of facts was agreed upon by counsel for the commission and for the respondent, to be taken in lieu of evidence, and findings of fact and conclusion were thereupon adopted by the commission and an order made thereon, dated January 29th, 1920, that the respondent cease and desist from using certain labels alleged in the complaint herein, except as provided in said order; thereafter the respondent, by its attorneys, filed with



the United States Circuit Court of Appeals, Second Circuit, a petition to review said order as provided by law, and notice of the same was duly served upon the commission; thereafter application was made on behalf of the commission to the said court for permission to take additional evidence, under the provisions of section 5 90 of the act of Congress, approved September 26, 1914, and by an order dated October 18, 1920, the motion was granted, and ninety days was allowed within which to take such evidence; such additional evidence thereafter having been introduced in support of the allegations of said complaint before Mr. James McKeag, an examiner of the Federal Trade Commission, theretofore duly appointed, and an opportunity having been given to the respondent to introduce evidence on its behalf, and respondent, by its attorneys, having rested without the taking of evidence.

Now, in accordance with the provisions of section 5 of the act of Congress approved September 26, 1914, the commission having duly considered the record, and being now fully advised in the premises, modifies its findings as to the facts, as previously adopted, and makes new findings by reason of the additional evidence, constituting all its findings of facts herein, as follows:

#### FINDINGS AS TO THE FACTS.

Paragraph one: The respondent, Winsted Hosiery Company, is and has been for the last twenty years a corporation duly incorporated under the laws of the State of Connecticut, and is and has been during that time engaged in the manufacture of knit underwear, shirts and drawers, and hosiery, having its principal place of business and factory at Winsted, Connecticut, and a branch factory at Norfolk, Connecticut, and one at Unionville, Connecticut; the respondent for more than ten years has sold, and now sells, its product of knit underwear, including men's shirts and drawers, throughout various States of the United States, and has conducted its business of manufacture and sale as above described in competition with other persons, firms, and corporations similarly engaged.

Paragraph two: The respondent in the conduct of its business as stated in paragraph one, has for more than ten years prior to October 30, 1918, the date of the issuance of the complaint herein, sold and shipped its products, namely, knit underwear, to purchasers thereof located in different States of the United States; and 91 during the time named, there has been a constant trade and commerce in such product between and among various States of the United States. For the three years prior to October 31, 1918, the respondent's sales of its product of knit underwear aggregated \$2,500,000.

Paragraph three: Respondent admits by its answer that for more than one year prior to January, 1919, it has, in the conduct of its business, manufactured and sold in commerce (as set forth in the

complaint herein) and labeled, advertised, and branded certain lines of underwear as "Men's Natural Merino Shirts," "Men's Gray Wool Shirts," "Men's Natural Worsted Shirts," "Australian Wool Shirts," and "Men's Natural Wool Shirts," and that such underwear is not composed wholly of wool.

Paragraph four: The methods employed by the respondent in labeling, advertising, and branding its product are effective to carry both to the retailer and the ultimate consumer thereof the representation that such garments were composed wholly of wool, and in the absence of technical knowledge in either the retailer or the consumer tended to create the belief that such garments were in fact wholly composed of wool.

Paragraph five: During the period of more than five years prior to October 30, 1918, labels bearing the various legends set out in paragraph three have been pasted on or attached by respondent to the boxes in which it sold and delivered to its customers underwear manufactured by it; said labels also bore respondent's trade-mark, consisting of the words "Winsted Hosiery Company" in a circle.

Paragraph six: The underwear so labeled, advertised and sold, as set forth in paragraphs three and five, was not composed wholly of wool, being part wool and part cotton, the percentage of wool therein varying generally from 25% to 80%, and in some cases being as low as 10%; as a rule, for the underwear containing 50% or less of wool, respondent has used labels containing the word "Merino," and on those containing more than 50% of wool, labels containing the word "Wool."

Paragraph seven: The percentage of wool in the underwear manufactured by respondent and sold under the labels stated above, varied from time to time according to the relative cost of wool and cotton and according to the loss in the process of fulling, the latter extending to 5%. Respondent has not put any all-wool underwear on the market for a good many years.

Paragraph eight. Respondent sells its product of underwear to retailers.

Paragraph nine. Respondent's boxes containing its underwear, labeled as set forth in paragraph three have been customarily placed by purchasers, namely, retailers, on their shelves, exposing said labels to the view of their customers, and retailers and their salesmen have sold the contents from the boxes so labeled to the public.

Paragraph ten. The word "Merino" means primarily and popularly a breed of sheep whose fleece is a fine long-staple wool, and as applied to wool it signifies the fleece of that sheep or a grade corresponding to it in quality. It is so used commercially in the wool trade and commands the highest price.

The noun "wool" means the fleece or coat of the domesticated sheep, and as an adjective the word means "made of wool."

"Worsted" means primarily and popularly a yarn or fabric made wholly of wool.

"Australian wool" means primarily and popularly wool grown in Australia and is a distinct commodity in the wool and yarn markets, and is known generally as a fine grade of wool.

Paragraph eleven. The Merino sheep, meaning a sheep of the Merino blood, has been celebrated for centuries in Europe for its fine wool, and was imported into this country early in the nineteenth century, and has been conserved and bred here ever since and recognized as the sheep producing the highest grade of fine wool. It has existed and now exists in large numbers in various parts of this country.

The classification or grading of wool in the wool market is based on the standard of the wool of the Merino sheep, the terms "fine," "¾ blood," "half-blood," etc., as grades of wool, referring primarily to full-blood, three-fourths and one-half blood, respectively, of the Merino breed.

Paragraph twelve. A substantial part of the consuming public understand the words "Merino," "Natural Merino," "Natural Wool," "Gray Wool," "Natural Worsted," "Australian Wool," and "Gray Merino" as applied to underwear to indicate all-wool underwear.

Paragraph thirteen. Some buyers for retailers and sales people understand the words "Merino," "Natural Merino,"  
93 "Natural Wool," "Gray Wool," "Natural Worsted," "Australian Wool," and "Gray Merino," as applied to underwear to indicate all-wool underwear.

Paragraph fourteen. Some retailers and their salesmen rely on the labels on the boxes in which they sell their underwear, including respondent's, such as "Merino," "Natural Worsted," "Australian Wool," and "Gray Merino," and use them to sell underwear under such labels as all-wool.

Paragraph fifteen: The labels "Merino," "Natural Merino," "Natural Wool," "Gray Wool," "Natural Worsted," "Australian Wool," and "Gray Merino" used on garments composed partly of wool and partly of cotton, or their containers, tend to encourage and aid representations to consumers by ignorant or unscrupulous retailers and salesmen that the underwear so labeled is all wool. The pay of retail salesmen of underwear often depends in part on the amount of their sales.

Paragraph sixteen: The labels, "Natural Merino," "Natural Wool," "Gray Wool," "Natural Worsted," "Australian Wool," and "Gray Merino" as used by respondent for its underwear composed partly of wool and partly of cotton, or on the containers, are calculated to and do mislead a substantial part of the purchasing public to believe that the garments sold under such labels are all wool.

Paragraph seventeen: The words "Merino," "Wool," and "Worsted," as used by respondent in labels applied to their product of knit underwear, severally tend to and do mislead a substantial part of the consuming public to believe that they indicate all-wool garments, and into purchasing in that belief.

Paragraph eighteen: The respondent makes and uses "wool-spun" yarns, composed of cotton and wool, in the underwear manufactured and sold by it under the labels as stated in paragraph sixteen, which make a soft, woolly fabric and tend to cause the purchasing public to believe that it is all wool.

Paragraph nineteen: The terms "Merino," "Natural Merino," and "Natural Wool" have been for many years used by some manufacturers as labels for underwear made entirely of cotton. The sales people of retailers can not tell from their own examination the proportions of wool and cotton in knit underwear composed partly of wool and partly of cotton.

94 Paragraph twenty: The word "Merino" is used by manufacturers of yarn and knit underwear and largely by jobbers and retailers as a trade term meaning a combination of cotton and wool. Yarns made partly of cotton and partly of wool fibres and known in the terminology of the trade as "Merino" yarns are sold and billed by yarn manufacturers to underwear manufacturers as containing definitely stated percentages of cotton and wool. The term "Merino" when applied in the retail trade to underwear composed partly of wool and partly of cotton, is used regardless of the percentages of wool and cotton and has no definite meaning.

Paragraph twenty-one: All-wool knit underwear has been widely manufactured and sold in this country for twenty years or more under various labels, such as "All-wool," "Wool," "Natural Wool," "Random Wool," and "Pure Wool," and under trade mark brands without any words descriptive of the composition thereof. All-wool knit underwear of domestic manufacture has constituted a substantial proportion of the total product of all-wool and wool-and-cotton underwear. According to the census of 1914, for manufactures of textiles, the latest available, the amount of all-wool knit underwear, namely, shirts and drawers, as compared with the output of such underwear made partly of cotton and partly of wool, was for the year 1914, in quantity, that is by dozens, 373,045 dozens to 1,434,504 dozens, and in value \$3,448,575 to \$9,228,686; or 20% approximately in quantity and 27% in value of the entire product of underwear in this country composed of wool in whole or in part.

Paragraph twenty-two: All-wool knit underwear has been imported for sale into this country by various retail dealers for twenty years or more and has been sold under various labels such as "All-wool," "Wool," "Natural Wool," "Pure Wool," "Lamb's Wool," and under trade marks, e. g., "Demophilo," "Two Steeples," and some has been so imported and sold without any label indicating its composition. Knit underwear has been imported for sale into this country for twenty years or more, composed of various percentages of cotton and wool, under the labels "Cotton and Wool," "Cotton and Wool Mixed," "Gauze Merino," "Wool and Cotton," or "Cotton and Wool," according to whether the percentage of wool or cotton present was greater, or less.

Paragraph twenty-three: The knit underwear manufactured in this country consisting of cotton and wool in various percentages has been sold for ten years or more under a variety of labels differing from respondent's as set out in paragraph three; a large  
95 number of the total output of such garments have been made and sold by manufacturers without any label or marking describing the materials or fibres of which they are composed, such as cotton and wool, but under the private trade-mark or brand of the manufacturer or retailer alone. Manufacturers of knit underwear made partly of cotton and partly of wool have been accustomed to sell their underwear under labels in the form and language requested by their customers, and such labels include both trade-marks or brands without descriptive words and terms such as "Fine" and "Superior" in combination with the word "Underwear," without words descriptive of the composition; and fancy or coined names. Such underwear has also been sold under the labels "Cotton and Wool" and "Part Wool."

Paragraph twenty-four: Knit underwear composed partly of cotton and partly of wool, under the labels "Natural Merino," "Natural Wool," "Gray Wool," "Natural Worsted," "Australian Wool" or "Gray Merino," has been sold by respondent in competition with underwear manufactured wholly of wool, imported and domestic, and manufactured and sold under labels indicating that fact, or under some of the labels named above in this paragraph or under private trade-marks or brands alone, without descriptive terms, and in competition with knit underwear composed partly of cotton and partly of wool, imported or domestic, manufactured and sold under labels indicating such composition or under trade-marks or brands alone, without descriptive terms or under labels bearing fancy or coined names.

Paragraph twenty-five: Some retailers have ceased the use of "Merino" on underwear made partly of cotton and partly of wool since before the beginning of this proceeding because of its uncertain, ambiguous, and misleading meaning to the public.

Paragraph twenty-six: It is the sense of the underwear industry, as expressed by the American Knit Goods Manufacturers, an organization representing approximately 75% of manufacturers in this country of the class of knit underwear manufactured by respondent, that the use on knit underwear composed partly of wool and partly of cotton of the words "Wool Underwear," "Worsted Underwear," "Natural Wool Underwear," "Australian Wool Underwear," and "Natural Merino," among others, are "improper," and the words "Wool and Cotton" are recommended by said association for use as labels on underwear made partly of wool and partly of cotton, and the said organization has by official action requested its mem-  
96 bers to drop the use of the word "Merino" as a label on underwear made of cotton and wool unless followed by the words "wool and cotton."

Paragraph twenty-seven: It is the sense of retailers as expressed by the board of directors of the National Association of Retail Clothiers that the terms (1) "Natural Merino," (2) "Gray Wool," (3) "Natural Wool," (4) "Natural Worsted," (5) "Australian Wool," used as a brand or name on underwear that contained cotton or other adulterant than wool, or on the box containing such underwear, might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated and that such misleading terms should not be used.

Paragraph twenty-eight: Respondent has continuously up to the present time manufactured and sold knit underwear under the labels set out in paragraph three, and the proportions of wool and cotton therein have not differed materially from those stated in paragraph six.

## CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the commission.

(Signed) HUSTON THOMPSON,  
*Chairman.*

Dated this 14th day of January, A. D. 1921.

Attest:

[SEAL.] (Signed) J. P. YODER,  
*Secretary.*

97 UNITED STATES OF AMERICA,  
*Before Federal Trade Commission, ss:*

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of January, A. D., 1921.

Present: Huston Thompson, chairman; Nelson B. Gaskill, Jno. Garland Pollard, Victor Murdock, commissioners.

FEDERAL TRADE COMMISSION	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY.	

## RECOMMENDED MODIFIED ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon complaint of the commission, the answer of the respondent, the statement of facts, agreed upon by counsel for the commission and respondent, and upon the additional evidence taken for the commission under an order of the United States Circuit Court of Appeals, for the Second Circuit, dated October 18, 1920, and the commission having, by reason of such additional evidence, modified

some of its original findings and adopted new findings as to the facts and adopted its conclusion, that the respondent has violated the provisions of the act of Congress, approved September 26, 1914, entitled, "An act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes," it now recommends the following modification of its original order to cease and desist herein, dated January 20, 1920:

*It is now ordered*, that the respondent, the Winsted Hosiery Company, its officers, agents, representatives, servants, and employees, do cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered  
98 to customers, the word "Merino," "Wool," or "Worsted," alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g. "Merino, Wool, and Cotton;" "Wool and Cotton;" "Worsted, Wool, and Cotton;" "Wool, Cotton, and Silk"), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g. part wool).

Respondent is further ordered to file a report in writing with the commission three months from notice hereof, stating in detail the manner in which this order has been complied with and conformed to.

By the commission.

[SEAL.]

(Signed)

J. P. YODER,

*Secretary.*

99 Federal Trade Commission.

FEDERAL TRADE COMMISSION	} Docket No. 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY.	

BEFORE THE FEDERAL TRADE COMMISSION.

FEDERAL TRADE COMMISSION, COMPLAINANT,	} Docket No. 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY, RESPONDENT.	

105 NEW YORK, N. Y., *November 15, 1920.* 10 a. m.

Before: James McKeag, examiner.

Met pursuant to notice.

Appearances: Mr. James T. Clark, appearing for the Federal Trade Commission.

Mr. Henry P. Molloy and Mr. Melville J. France (25 Broad Street, New York, N. Y., appearing for the respondent.

108

PROCEEDINGS.

Mr. CLARK. The examiner will state the reason for our being here.

Examiner McKEAG. This hearing as I understand it is being held in pursuance of an order entered by the United States Circuit Court



of Appeals for the 2nd Circuit, sending back to the Federal Trade Commission the case entitled Winsted Hosiery Company, petitioner, *vs.* The Federal Trade Commission, respondent, for the purpose of taking additional evidence in support of the issues which arose in this case which was originally pending before the Federal Trade Commission as docket 214. The order was entered on the 18th day of October, 1920, by that court and is as follows:

"A motion having made herein by counsel for the respondent to remand this proceeding for the purpose of taking further testimony;

"Upon consideration thereof it is

"Ordered that said motion be and hereby is granted, the respondent to have ninety days from the date hereof within which to take such evidence."

That is the order presented by the court.

Mr. CLARK. Yes.

109 Examiner McKEAG. And we are here pursuant to notice served by counsel for the Federal Trade Commission, to take this additional testimony. I will call Mr. Gaylord.

Mr. MOLLOY. Mr. Clark, before putting Mr. Gaylord on the stand I should like to make an offer, so that it may be of record.

The Winsted Hosiery Company, as one of the manufacturers in the knit goods industry, as a result of the proceeding instituted against it, joined with other manufacturers in the industry, and desiring to meet the issues of the Federal Trade Commission on the subject of labeling and branding, they held a meeting in Albany as the result of which a committee was appointed to investigate the subject complained of by the Federal Trade Commission, and that committee afterward made a complete investigation of the subject and made its report or its recommendations to a meeting of the Knit Goods Association of America held later at Utica. At this meeting the association adopted the report submitted by its committee, which in turn was presented to the Federal Trade Commission. The substance of that report—

Mr. CLARK. Excuse me. Do you intend this as something in the nature of evidence?

110 Mr. MOLLOY. No, I do not; I just want to lead up to my offer. The report is on file with the commission and speaks for itself. As a result of that report a stipulation was entered into in this proceeding, signed by counsel for the Federal Trade Commission and counsel for the Winsted Hosiery Company, and approved by the commission.

That stipulation is now on file with the commission. As a result of the adoption of the report by the association, which was acquiesced in by the Winsted Hosiery Company, and the stipulation entered into by the Winsted Hosiery Company in this proceeding, the Winsted Hosiery Company accepted the rulings of the Federal Trade Commission and the order entered, excepting in so far as—

Mr. CLARK. Oh, we will have to have that a matter of proof, I think.

Exam. McKEAG. Let Mr. Molloy state it.

Mr. MOLLOY. Excepting in so far as the order directed the Winsted Hosiery Company to cease and desist from directly or indirectly employing or using the label and brand "Merino" on underwear, socks, or other knit goods composed partly of wool.

The Winsted Hosiery Company offers to accept the order of  
111 the commission as made on the date of January 29, 1920, excepting in so far as the word "Merino" is directed to be abandoned.

Examiner McKEAG. As I understand then, the Winsted Hosiery Company has no complaint against the order of the Federal Trade Commission except as to the use of the word "Merino" as applying to knit goods manufactured partly of wool.

Mr. MOLLOY. We do that as a part of the spirit that actuated the manufacturers generally in meeting the complaint which was lodged against the branding and labeling of merchandise by the use of other terms which the association recognized might have a tendency to deceive the purchasing public; and rather than to leave a stain upon their industry they voluntarily accepted the order directing them to cease and desist from using any of those phrases.

Mr. CLARK. I ask that that be stricken from the record as superfluous.

Mr. MOLLOY. I am merely stating what the record shows.

Mr. CLARK. Very well. Let it show it.

Examiner McKEAG. You are familiar with the point made in the case pending in the Circuit Court of Appeals. Is that the only point that is being made by the petitioner in the Circuit Court of Appeals for the Second Circuit?

112 Mr. MOLLOY. It might appear that the whole question is open there. That is the reason I am making this offer now, so as to limit the question involved.

Mr. CLARK. Mr. Examiner, of course, we are here under the order of the Circuit Court of Appeals for the purpose of taking further testimony, and I think we should pursue that purpose until we are further ordered by the commission.

Mr. MOLLOY. I take it that the purpose of the order sending this proceeding back to the commission is for the purpose of taking evidence to sustain its order. If there is an admission on the record that avoids the necessity of doing that, it seems to me a waste of time and energy to take testimony when we are willing to admit and accept the ruling as it is contained in this order affecting it. I might refer to the petition made by counsel for the Federal Trade Commission to the Circuit Court of Appeals upon which it has made this order. I will read the prayer:

"Wherefore the respondent herein respectfully moves the court to remand this case to the Federal Trade Commission for the pur-

pose of introducing evidence showing or tending to show that the labels used by the Winsted Hosiery Company, embraced in the commission's order, do mislead the ultimate consumer; and evidence concerning the attitude of the great majority of manufacturers in the industry in condemning the use of the word 'Merino' without the use of the explanatory word 'wool and cotton' as misleading."

So that counsel for the commission itself has limited the scope of this hearing.

Mr. CLARK. I do not think it is a question either of the powers of the commission or their judgment as to what is proper in the premises, whether this offer should be now passed upon. I submit that it is outside of the examiner's power to rule upon it. I have stated to Mr. Molloy that we would transmit the offer to the commission.

Examiner McKEAG. That is true. The powers of the examiner are limited so far as defining the scope of some of the testimony and the order is concerned. The order of the Circuit Court of Appeals is general, and applies simply to further testimony, and is unlimited, and it would seem to me that the proper procedure would be to take the evidence which you are prepared to present to-day, and submit counsel's offer to the Federal Trade Commission, asking their instructions on the matter. I suggest that you proceed in accordance with that.

Mr. CLARK. I call your attention to the fact that the passage from the commission's application to the Court of Appeals does cover all the labels as an issue in the case, because of their alleged tendency to mislead.

Examiner McKEAG. Counsel admits that all the other labels except those bearing the word "Merino" do have a tendency to mislead.

Mr. MOLLOY. No; I do not admit that. I admit that the Winsted Hosiery Company are willing to accept the order of the commission directing them to cease and desist from using those terms.

Examiner McKEAG. Because the knit goods manufacturers have made a report admitting that there might be a tendency to mislead the purchasing public by the use of those terms.

Mr. MOLLOY. The stipulation on the record so states. The stipulation on the record in this particular proceeding states that.

Mr. CLARK. I will call Mr. Gaylord.

EDWARD B. GAYLORD, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. You are the president of the Winsted Hosiery Company, the respondent in this proceeding?

115 A. General manager, not president.

Q. Who is the president?

A. Mr. L. W. Tiffany.

Q. Is he here?

A. No; he is not.

Q. You received a subpoena duces tecum in this case?

A. Yes.

Q. Have you brought with you the matter asked to be brought in that subpoena?

A. As far as possible.

Q. State what you have produced generally. State what you have produced in compliance with the request of the subpoena.

A. In the subpoena you asked for five styles of labels. I have brought four of them. As to one of them, we have no record of such a label. I would not say that in years past we may not have had such a label, but we have no such label on hand. We change our labels occasionally for other reasons rather than the description, and some old labels are sometimes discarded. Shall I read the labels you asked for?

Q. No.

A. I have those labels here.

Q. What is the next item in the subpoena?

A. "Also samples of men's underwear shirts put up in boxes  
116 or the containers so labeled."

Q. Have you those?

A. I have one sample which represents the way we box them, and I have what we call swatches of pieces representing the fabrics of five different styles of goods. These five represent all of our grades. We have thirty or forty different styles, but the wording of the labels is the same.

"Also such records of the Winsted Hosiery Company as show the composition of the goods put up in containers so labeled in respect to the amount of wool and cotton in the garments sold under the labels named respectively."

I have those samples.

Q. Have you the information as to the contents?

A. I have the information covering the next paragraph here:

"In respect to the amount of wool and cotton in the garments."

I have that information.

And then the last one is:

"Also data showing, generally, the volume and extent of the company's business in goods put out under said labels for the three years preceding October 31, 1918."

Q. I suppose you are prepared to show that generally?

A. Yes.

117 Q. Where is the Winsted Hosiery Company located?

A. At Winsted, Connecticut.

Q. How long has it been doing business under that incorporation?

A. Since 1882.

Q. It is a Connecticut corporation?

A. A Connecticut corporation.

Q. Is it subordinate to a larger company or is it an independent company?

A. It is an independent company.

Q. Has it any allied or associated companies?

A. No; we have one or two branches, but they are run by the company. We are not connected with any other company.

Q. What are the branches?

A. We have a branch mill at Norfolk, Connecticut.

Q. What is the name of that mill?

A. The Winsted Hosiery Company, simply a branch. We have a branch mill—we do not own it—in Unionville, Connecticut, fifteen miles from us.

Q. But your principal mills are in Winsted, Connecticut?

A. In Winsted, Connecticut.

Q. Will you let me have the labels and the goods that you have produced?

118 A. There are five pieces of fabric, containing four different kinds of labels. The fifth one, as I stated, we have no labels left of. If we ever had the label we haven't it to-day. In fact we have not used the fifth term here for several years.

Q. Which term is that?

A. That is the term "Australian wool shirt." I think in the past we have used it, but it is one of those things that we discarded a number of years ago.

Q. As general manager of the Winsted Hosiery Company you are familiar, are you, with the packing and labeling of its products in the past five years?

A. I think so; yes.

(Counsel produced a sample which was marked "Exhibit 1.")

By Mr. CLARK:

Q. I show you this sample marked "Exhibit 1."

Examiner McKEAG. Let it be shown that that is one of the exhibits produced by the witness in response to the subpoena.

Mr. CLARK. Yes.

By Mr. CLARK:

Q. I show you this sample of goods marked "Exhibit 1," and  
119 I ask you to read the label on that.

A. "Men's Natural Merino Shirts, Patent Seam."

Q. And the sample on which that label appears in Exhibit 1 is the same as the goods on which that label has been used in delivering your manufactures of underwear?

A. I would rather say that this label was used on that fabric which we made in October, 1915. I would not say that we did not use that same label on the same style.

Q. At any rate, that label was used on goods of that quality?

A. On that fabric.

Q. You say the particular fabric to which that label was applied by you as a manufacturer was made in 1915?

A. 1915.

Q. And has the same fabric been made since continuously?

A. Not necessarily the same fabric. We make the same goods number to-day, but it is not necessarily the same fabric. We vary that fabric according to the market price of wool and cotton and labor.

Q. And what is the number of these goods which appears on the label applied to that goods in 1915?

A. No. 2265 N.

Q. Can you state the contents of the goods of which this is a  
120 sample, in respect of the amount of wool and cotton in it?

A. Our records show that it contains 43 per cent of wool.

Q. What are your records based on?

A. Based on our batch book.

Q. On what?

A. What we call our batch book, the record of the mixing of the stock.

Q. Who kept that book?

A. It is kept in the mill by the foreman of the carding department.

Q. He has the supervision of the mixture of wool and cotton, I take it?

A. Yes; this foreman has.

Q. Does the cotton in that goods appear in the yarn?

A. It is mixed in. It is a mixture.

Q. In the yarn?

A. Yes. The cotton and the wool are both mixed together—not separated.

Q. So that your statement is that the yarn of which this fabric is made contains 43 per cent of wool?

A. Yes.

Q. Who is the foreman of that batch work?

121 A. At present a man by the name of Ebenbeck.

Q. Who was foreman when this was made?

A. I could not tell you without looking up the records.

Q. Can you state of your knowledge the process by which the amount of wool and cotton in the yarn is determined by your foreman who has that in charge?

A. We make up an order to mix a certain quantity of stock for certain batches, and that order reads so much wool, so much thread waste perhaps, so much cotton.

Q. That order is to the yarn man?

A. That order is to the foreman of the carding department.

Q. Do you make your own yarn?

A. Yes.

Q. And he has the supervision of the spinning of the yarn?

A. Yes.

Q. So your statement as to the amount of wool and cotton in this is based on your orders to the head of the department which controls the spinning of the yarn?

A. Yes.

Q. I understand you to say that while this same label has been used since 1915 by the Winsted Hosiery Company it has been put on goods which has not the same proportions of wool and cotton?

A. Yes.

Q. Can you state generally how the proportions of wool and cotton have varied since that time, from 43 per cent wool and 57 per cent cotton?

A. I can make a general statement which will cover the case. It could not be accurate without looking through every batch.

Q. I said a general statement.

A. It has run from 40 to 48 or 50 per cent wool for the last ten years.

Q. I think you stated that the variation is based on the relative cost of wool and cotton?

A. Yes.

(A pasteboard box was marked "Exhibit 2.")

By Mr. CLARK:

Q. I show you this box marked "Exhibit 2" and ask you to read the label on that.

A. Men's Gray Merino Shirts, Patent Seam, style 2383 G.

Q. I will ask you if that package or box is typical of the boxes which the Winsted Hosiery Company has used in the past for packing its men's shirts?

A. It is.

123 Q. That is underwear shirts?

A. Yes.

Q. And the label which you have read is pasted on this box and it follows or illustrates the practice of the company in the past in labeling its boxes irrespective of the precise language of this label?

A. I will make an exception there. For that particular grade we usually use wool. I can not tell why that happened to be Merino. We have no hard and fast rule, but that is a better grade and we usually label that grade wool, but that has been going out under the word "Merino."

Q. You did not quite understand my question. I only want to have it appear that the label, which was Exhibit 1, and other labels which the Winsted Hosiery Company uses, are placed on their boxes in which their goods are packed, as in Exhibit 2?

A. Yes.

Q. Does the label Exhibit 1, or any label or brand containing substantially the same language, appear also on the garment?

A. No, sir; only on the boxes.

Q. Are the garments branded at all so as to identify them as of your manufacture?

A. We simply put on our trade-mark without any description.



124 Q. What is that?

A. The trade-mark is contained in that monogram there, "Winsted Hosiery Company."

Q. As it appears on the label in Exhibit 1?

A. Yes.

Mr. CLARK: I offer in evidence Exhibit 1.

Mr. MOLLOY. No objection.

(The exhibit so offered and identified was received in evidence, marked "Exhibit 1," and is forwarded herewith.)

By Mr. CLARK:

Q. Referring to Exhibit 2, I show you a man's underwear shirt and ask if that is the goods which is labeled and packed by you as "Men's Gray Merino Shirts" under the label of Exhibit 2?

A. Under label No. 2383 G.

Q. I will ask you to state the quality of that garment in respect of its contents of wool and cotton.

A. I have not the percentage in that shirt, but you asked for information prior to October, 1918. I have information as to the same garment made in March, 1916, under the same label number and label reading, a label reading the same, which contains 70 per cent of wool.

125 Examiner McKEAG. You had better have that marked.

(The sample so identified was marked "Exhibit 3.")

Examiner McKEAG. Let the record show that the witness referred to Exhibit 3 in his last answer.

By Mr. CLARK:

Q. I show you the sample of goods marked Exhibit 3 and ask you to read the label on that sample.

A. "Men's Gray Merino Shirts, Patent Seam, style 2383 G."

Q. I understand you to say that that sample represents the goods which you manufactured and labeled and packed prior to November, 1918, under the label "Men's Gray Merino Shirts."

A. Yes.

Q. And your statement as to the proportion of wool as being approximately 70 per cent applies to this sample Exhibit 3?

A. Yes.

Q. And the wool and cotton content of that garment is also determined by the combination of the two in the yarn?

A. Yes.

Q. And is your statement as to the proportions based on the same information as related to the first sample?

A. Yes.

126 Mr. CLARK. I offer in evidence this package or box marked "Exhibit 2" and this sample marked "Exhibit 3."

Mr. MOLLOY. No objection.

Examiner McKEAG. They may be received.

(The exhibits so offered were received in evidence, marked "Exhibit 2" and "Exhibit 3," and are forwarded herewith.)

Mr. CLARK. Both of these labels contain the word "Merino." Exhibit 1 reads "Men's Natural Merino Shirts." Exhibit 3 reads "Men's Gray Merino Shirts."

By Mr. CLARK:

Q. Is any of the wool in either of those garments merino wool?

A. I do not know what you mean by "merino wool."

Q. Are you able to state whether there is a wool known to wool growers and manufacturers distinctively as merino wool?

A. There is a breed of sheep called the merino sheep.

Q. And their fleece is distinguished as merino wool?

A. It is, in certain trades. We do not come in competition with that. We do not use that on the shorter wools. That is a combing wool.

Q. Are your garments made of the shorter wool?

A. Our garments are made of the shorter wool.

Q. And the true merino wool is a longer staple wool?

A. A long staple wool for combing purposes.

127 Q. It may help our understanding if we go into that a little bit. Am I correct in stating that all wool is combed?

A. We card. We make what is called a carded yarn, in other words, a wool-spun yarn, what is known as a wool-spun yarn, as separate and distinct from a worsted-spun yarn.

Q. I understand that worsted, as distinguished from other fibers, goes through two processes—combing and carding?

A. Combing only, through a comb.

Q. And that is for the purpose of eliminating the shorter fibers, is it not?

A. Yes.

Q. Worsted being a long-staple wool?

A. Yes.

Q. And you say that you comb?

A. We card.

Q. And that, I take it, is because you use short-staple wool to begin with?

A. It is because we have to. It would be impossible to use some of the long-staple wool in the card process, mixed with other fibers like cotton.

Q. Then the fact is that cotton can not be combined in yarn with long-staple wool?

A. Beyond a certain point. It is hard to say yes or no on 128 that.

Q. There is practically a point where cotton may not be combined?

A. Where it would not be practicable to combine the two.

Q. Is that dividing point where worsted is distinguished from other wool?

A. Yes; and still that answer ought to be qualified, because they have what they call the French system of worsted spinning, which

will take comparatively short wools. That is something that has come in in recent years. They used to make it by the old English system.

Q. But outside of that new process called the French process, generally speaking, a worsted fiber—that is, the longer staple wool—can not practically be combined in yarn with cotton?

A. Not successfully.

Q. And Merino, meaning the wool from a breed of sheep known as Merino sheep, is a long-staple wool?

A. Yes.

Q. And you do not use it?

A. We do not use the long staple. We do not buy it. That is called combing wool in the market.

Q. And that would exclude from your consumption the manufacture of merino wool as the fleece of the merino sheep?

129 A. Yes. Now that ought to be qualified.

Q. Very well. We only want to get along.

By Examiner McKEAG:

Q. Do you want to qualify your statement?

A. Simply to say this: Here is a flock of merino sheep. They sometimes clip that wool at six months, sometimes at eight months, sometimes at a year. The sheep are called merino, the merino breed, and I suppose all the wool would be called merino. We could use the six-months wool in our business. We have never come across any merino wool, and we have bought wool for thirty-five years. We have never come across the word.

Q. Is there in the market a distinction of the six-months clip merino wool and other six-months clip wool?

A. We call it six months Texas.

Q. Is the merino clip of six months distinguished from the clip, from the six-months clip of other wools?

A. We do not run across the term "Merino" in buying wool.

Q. You do not look for it?

A. No; I do not look for the term.

Q. I call your attention to the fact that one of these samples, Exhibit 3, is called "Men's Gray Merino Shirts," and Exhibit 1 is called "Men's Natural Merino Shirts." What distinction or difference in the two terms "Gray" and "Natural" is applied to merino shirts? Is it a greater or less content of wool?

130 A. It refers to the color. The color of one is produced by using a black top.

Q. Which is that?

A. That is the gray, this one here.

By Examined McKEAG:

Q. What exhibit?

A. Exhibit 3. The other is a brown-dyed top.

My Mr. CLARK :

Q. Is the natural merino shirt material dyed?

A. Both of them are.

Q. These two samples represent the colors of these goods as you sell them?

A. Yes.

Q. I do not see any brown color myself. Is that a purely technical term?

A. The one you have there is black. That is made out of jet black.

Q. Exhibit 1 you say is the brown?

A. The brown.

Q. Is not that a purely technical term of manufacture? You would not describe that actual appearance as brown, would you?

A. If I could show you the top, it is a seal brown.

131 Q. What do you mean by "the top"?

A. The color that goes in there.

Q. Is that the dye itself?

A. It is a dyed fibre.

Q. Wool fibre?

A. Wool fibre, and it is a seal brown, not black.

Q. Is that dyed before it is twisted in the yarn?

A. Yes; dyed before it is mixed.

Q. And it is dyed for the purpose of giving the manufactured article a different shade?

A. A gray shade, what we call gray.

Q. So the brown applies to the yarn and not to the final appearance of the fabric—the term "brown"?

A. No; it follows it all the way through.

Q. You would not call this sample brown in color, would you?

A. Oh, no; the word "brown" refers to the color of the mix that produces the natural or gray shade.

Q. And the quantity of brown I should judge used in the yarn was small, in that it does not produce in combination with the other contents of the yarn a brown color in the finished article?

A. No; it makes a mixed.

132 Q. You know, do you not, that certain branches of this art of textiles consume the wool which is peculiar to the merino sheep?

A. No; I do not.

Q. Are you familiar with the grades of wool on the wool market in Boston?

A. Only those that interest us.

Q. Then you can not say as to whether or not there is a grade of wool known as merino because it comes from the merino sheep?

A. I can not.

Q. You can not say?

A. I can not.

By Examiner McKEAG:

Q. Before you leave that I should like to ask a question to satisfy my own curiosity. How long has the word "merino" been used on this class of goods by your company?

A. Since 1882.

Q. What was the object of adopting that sort of a label on that brand or type of goods?

A. Because it describes the fabric known in the trade as a mixture of wool and cotton.

By Mr. CLARK:

Q. I show you this sample, which I will have marked Exhibit 4, and ask you to read the label on that.

133 A. "Men's natural worsted shirts, full fashioned, No. 3503 N."

Q. How long has that label been used by this company—about?

A. About since we first commenced to make this class of goods, which would be a guess, but I should say 30 years.

Q. By "this class" what do you mean?

A. I mean the worsted. We did not always make the worsted goods.

Q. And this label which you have just read, like the other label, has been pasted on the boxes in which such goods were packed and delivered?

A. Yes.

Q. What does "full fashioned" mean?

A. That refers to the way the goods are knit. They are knit to a form with a selvedge edge, like full fashioned hose.

Q. Is this sample Exhibit 4 the same as goods actually made by you prior to November, 1918, and used in the manufacture of men's undershirts?

A. It is exactly the same as was used March 30, 1916.

Q. Will you tell me if you can the content of that as to the proportion of wool and cotton?

A. 80 per cent wool.

Q. And what quality of wool?

A. That is a worsted yarn. We buy that yarn. We buy  
134 that from the worsted spinners, and it is known and bought as worsted merino.

Q. Is there any cotton in that worsted yarn?

A. 20 per cent.

Q. In the yarn?

A. In the yarn.

Q. So I take it that is a grade of worsted wool which is sufficiently short in the staple to be combined with cotton, under the division which you have stated?

A. No, that is wrong. The worsted spinner can combine on his combs fabrics which we can not on a wool card. That is probably

long-staple wool combined with a long-staple cotton, usually Peruvian cotton.

Q. Do you know the specifications to the worsted spinner on which that yarn was supplied to you?

A. No, sir.

Q. Who does?

A. The worsted spinner would know his own mix. We buy the yarn to be worsted merino 80 per cent yarn. We rely on him to that extent. We sometimes analyze yarn.

Q. Do you recall having had that analyzed?

A. I do not. That is so far back that I have no recollection.

135 Q. Do you continue to put out substantially the same goods as these three exhibits, 1, 3, and 4, under the same labels?

A. Yes.

Q. You have some knowledge, I judge, of the related lines of textile goods such as cloths?

A. No more than anyone. I never was in a woolen mill. I never was in a woolen or worsted mill—I mean to have any connection with it.

Q. Don't you understand as a fact that the term "worsted" is applied in cloths for outer garments to mean all wool of a long staple?

A. Not all wool. It refers to the process, not necessarily the contents.

Q. To the process of combing as well as carding?

A. Yes; combing as distinguished from carding.

Q. And that process of combing which differentiates worsted products from other woolen products consists in combing, as the term indicates, so as to separate the short from the long fiber?

A. That is part of the process. There is also more to it than that.

By Mr. MOLLOY:

136 Q. What is the rest of it?

A. It is a straightening of the fibre, not separating entirely. It is a process of straightening the fibre.

Q. So in that respect combing is not distinguished from carding?

A. In that point the object is the same.

Q. So the distinction between the two processes is that in the combing process the shorter staples are eliminated?

A. That is part of it.

Q. I show you a sample marked Exhibit 5 and ask you to read the label.

A. "Men's Natural Wool Shirts, Patent Seam, No. 2323 X."

Q. And that label, like the others, has been in use by you, prior to November, 1918, and since?

A. Yes.

Q. And has been pasted on the boxes in which you pack your manufactures containing this material?

A. Yes.

Q. That is Exhibit 5.

A. Yes.

Q. Please state the contents of that goods as to the wool and cotton in it.

137 A. This fabric contains 60.4 per cent.

Q. Of wool?

A. 60.4 per cent of wool. May I make a statement here regarding that percentage question?

Q. Yes.

A. I have given you the percentages which we put into the garment. Without an accurate test out we do not know always what comes out in the process of fulling. Some fabrics will full off, and you can mix 50 pounds of wool and 50 pounds of cotton and put them through the comb, and there may be 48 per cent of wool or in some cases there might be 52 per cent of wool. In other words, the exact quantity that you put in in your picker room does not always come out in the garment.

Q. It varies as much as 2 per cent?

A. It might vary more than that under certain conditions. For instance, if the wool was very short, if the percentage of noils is heavy in the garment, there would more of that come out in the process of fulling and finishing, and it might come out even 45 per cent although 50 per cent was put in.

Q. What is the process of fulling?

A. Fulling is the process of washing. They are washed to  
138 get the oil and dirt out.

Q. The yarns, or the wool?

A. The goods, the fabric after the goods are knit and put together, and before the trim is put on. They are put into the fulling process and are fullled sometimes an hour and a half, to soften them, to bring them up.

Q. And in that process a slight percentage of either the wool or cotton may be lost?

A. Yes.

Q. At any rate this Exhibit 5 contains not more approximately than what percentage of wool?

A. The records show 60.4 per cent or about 60 per cent.

Q. And the rest is cotton?

A. Cotton, yes.

Q. I show you this sample marked Exhibit 6 and ask you to read the label.

A. "Men's Gray Wool Shirts, Patent Seam, No. 2325 G."

Q. And that label, like those in the other exhibits, has been used by your company on its packages of men's underwear for five years or more?

A. Yes.

Q. State the proportion of wool and cotton in that according to your records.

139 A. Our records show this contained 62.25 per cent of wool.

Q. Are these records on which you base your statement of the contents of these samples records made recently or some time ago?



A. They are the records made at the date these tickets show.

Q. And what is the date of this last exhibit 6?

A. September 1, 1916. You asked for information regarding this matter prior to October 31, 1918, so I brought nothing since then.

Q. I think if you will refer to the subpoena, it calls for goods manufactured since then.

A. I did not think you wanted the labels of one period and the goods of another.

By Examiner McKEAG:

Q. The samples are substantially the same as these exhibits which you have produced here?

A. Yes, barring the exceptions which I made in regard to the percentages, which change according to the market.

Q. Those percentages would vary to what per cent?

A. Ordinarily they would not vary five per cent from year to year, but under these unusual conditions, war time and all that, there has been quite a variation.

Q. And the variation has been in what direction?

140 A. Strangely enough, in both directions. You would naturally think as prices went up the percentage of wool would go down, but one factor is that cotton has been very high, and another is that we have gotten on to an entirely different plane as to prices, so that some of the goods are actually better than we used to make, but we are getting a good deal more for them. The material costs three or four times as much, and there is no general rule in regard to that.

By Mr. CLARK:

Q. Have any of the goods you have put out subsequent to the date of these exhibits been substantially below these proportions of wool?

A. No, sir; I think not.

Q. To refresh your mind I refer to the stipulation in the case. You were the representative of the Winsted Hosiery Company at the time that this statement of facts was stipulated between it and the Federal Trade Commission in this proceeding, were you not?

A. Yes.

Q. And you were acquainted with the provisions of that stipulation?

141 Mr. MOLLOY. Mr. Clark, if you are going to question him on the stipulation, I would like to have the stipulation made a part of the record. There seems to be possibly some question—

Mr. CLARK. It is a part of the record.

Mr. MOLLOY. In moving to the Circuit Court of Appeals one might draw the conclusion that the commission was avoiding the responsibility of the facts as stipulated in the record. Now, if you are going to examine on the stipulation, to show that the facts as we admit them in the stipulation are admissions binding us, then I want it on the record as binding the Government as well.

Mr. CLARK. I do not wish to show that. I am not treating the stipulation as binding the commission or you, but simply, as I stated, to refresh his recollection, to refer to the stipulation, which is a part of the record and before the court.

Mr. MOLLOY. Bring out whether he has any knowledge of the facts. The stipulation was agreed to by counsel to meet the facts in this case, and to eliminate controversy from the facts. Also the stipulation was prepared not merely for the Winsted Hosiery Company but for sixteen other respondents who approach the question of the stipulation as a single unit, not particularly as it went to the Winsted Hosiery Company or any other particular defendant.

Mr. CLARK. I do not see that in the stipulation.

Mr. MOLLOY. That is the fact. You are familiar with it, and I only want to tell you what is the fact.

By Mr. CLARK:

Q. You were acquainted with the provisions of the stipulation?

A. I could not tell without knowing what it is.

Q. There is a stipulation as the record shows, to the effect that the aforesaid—

Mr. MOLLOY. I object to reading any part of the stipulation without offering the entire stipulation in evidence. I object to reading any part of it or to questioning him on it. You are examining him on a stipulated fact in the stipulation on the record.

Mr. CLARK. I am not examining on it. I am refreshing his memory by it.

Mr. MOLLOY. All right. He has already answered that.

By Mr. CLARK:

Q. Do you recall that it was stipulated by the Winsted Hosiery Company that the goods manufactured by the Winsted Company under the labels involved in this proceeding varied in the portion of wool from 20 to 80 per cent? Do you recall that or not?

A. I do not recall the exact percentage.

Q. Was or was not that a fact at the period to which the proceeding relates, that is, say within the last five years?

A. The question is whether we made goods of from 20 to 80 per cent wool?

Q. Yes.

A. We might possibly have made them as low as 20, but our batch sheets do not show it.

Q. How little do your batch sheets show?

A. How low a percentage of wool?

Q. Yes.

A. I think about 25 per cent is the lowest.

Q. Do you recall under what label it was put out?

A. We have one number, I think, as low as that, yes, the number is 2255 G.

Q. And do you recall the label on the boxes or the garments?

A. I should say it was marked Merino. May I make a statement?

Q. Yes.

Examiner McKEAG. Let him explain.

A. While we have not any evolved system of labeling, as a rule goods 50 per cent or under were labeled "Merino" and goods above 50 per cent were labeled "Wool" in times past.

144 Q. And what were labeled worsteds?

A. Those made out of worsted yarn, without reference to the percentage of wool.

Q. So those labeled merino might be anywhere from 25 to 50 per cent wool?

A. In my recollection 25 per cent is about as low as we ever made.

Q. Do you make any distinction between natural merino and merino alone?

A. "Natural" refers only to the shade of the mix.

Q. Did you use the term "merino" alone, as far as you recall in any of your labels?

A. Without using the word "Natural" or "Gray"?

Q. Yes.

A. I think not.

Q. I take it you are familiar with the application of the term "merino" to knit underwear. You have stated that in your business you have applied it to those goods containing only 25 per cent of wool. Do you know of its being applied to goods containing still less wool?

A. Not by others; no.

Q. Have you known that it is applied to all cotton garments?

A. I have no knowledge of it, no.

145 Mr. CLARK. I offer in evidence Exhibits 4, 5, and 6.

Mr. MOLLOY. No objection.

Examiner McKEAG. They will be received.

(The samples offered and identified were received in evidence, marked Exhibits 4, 5, and 6, and are forwarded herewith.)

By Mr. CLARK:

Q. I think we have covered all the labels in question except label stated in the complaint as "Australian Wool Shirts." Did you ever use that label?

A. We have.

Q. How recently?

A. I have no exact knowledge as to that. It might be five years or eight years since we have used it.

Q. Could you ascertain?

A. Could I?

Q. Yes.

A. I am not sure that we could. We have no record of labels. We simply have the labels themselves, and when we change our style

of labeling we discard the old ones. I have hunted through all our labels, and could not find any label with that term, but we formerly used them.

Q. As a fact, what quality of fabric was that label applied to?

146 A. That was applied to the better qualities; I mean containing a large percentage of wool, and when they contained Australian wool only.

Q. And what, in your meaning of that statement, is Australian wool?

A. I mean wool that is grown in Australia.

Q. That is a distinct commodity, is it, in the wool market or yarn market?

A. Yes.

Q. Is it a high grade of wool?

A. Usually. I will qualify that by saying that they grade cross-breeds there. Cross-breed wool is a low grade, but the majority of Australian wool is fine.

Q. Does that superiority consist in the length of the staple or the entire quality?

A. Not necessarily in the length of the staple. It is in the fineness of the fiber.

Q. Is that the character of Australian wool generally?

A. The regular Australian wool is fine-fibered wool.

Q. Do you know the proportion of wool in the goods you manufactured at one time with this label?

A. I have no knowledge. I have no record. We applied it  
147 only to our finer grades.

By Examiner McKEAG:

Q. It contained a certain percentage of cotton, though?

A. Usually. We have made absolutely all-wool goods, but in that case we labeled them "all wool" or "guaranteed all wool."

By Mr. CLARK:

Q. Do you now manufacture such garments?

A. We have not for several years.

Q. Can you state more definitely when you discontinued it?

Examiner McKEAG. He said five or six years ago.

Mr. CLARK. "All wool"?

Examiner McKEAG. Oh, I beg your pardon.

A. I could not give you the exact date. It might have been ten years since we made any all wool. The chances are we may have made some samples, and may have made a few that we tried, and did not sell within that time; but as a rule we have not put any all-wool goods on the market for a good many years; not practically.

Q. Who are some of the chief manufacturers of all-wool underwear?

A. All wool?

Q. Yes.

A. I could not tell you.

148

By Mr. MOLLOY:

Q. Are there any?

By Mr. CLARK:

Q. Yes, are there any?

A. I do not know of anybody that makes all wool goods at this day. There was a concern that I had in mind, years ago, that made nothing but all wool goods, but they discontinued it.

Q. Who were they?

A. One was the Collins Company of Pittsfield, and the other was the Dunham Hosiery Company.

Q. Since you have ceased to manufacture them yourselves, I suppose you have not kept yourself informed as to the amount of all wool garments manufactured, especially?

A. We never made a feature of manufacturing it ourselves.

Q. So according to your idea the composition of most of the men's underwear manufactured in this country is that it is made of cotton and wool?

A. Winter underwear?

Q. Winter underwear. That applies to warmer underwear, does it?

A. The majority of the winter underwear is made out of a composition of wool and cotton.

Q. And that is put out under a variety of labels, I suppose?

149 A. It has been.

Q. Can you recall some of those other than yours?

A. I could not give you any names, but when we first went into this matter we found that everybody—that is about everybody—was labeling the compositions of wool and cotton as merino.

Q. When did you go into this?

A. This was when we took the matter up in 1918.

Q. In 1918?

A. In 1918.

Q. Prior to that you had no knowledge as to the use of the terms by other manufacturers?

A. We had incidental knowledge as we ran across them on the shelves of our customers.

Q. Is it not a fact that a large amount of cotton and wool underwear is put out by manufacturers without any descriptive labels such as "merino" or "natural merino" or "natural wool"?

A. I don't think so.

Q. You do not know?

A. I would not be positive to say.

Q. Is it not a fact that such goods are also put out by some manufacturers and have been as "cotton and wool"?

150 A. I was not aware of that.

Q. How long have you personally been in this branch of the textile industry?

A. Since 1885.

Q. In your mind how much wool does the term "merino" denote when it is applied to an underwear garment?

A. It does not denote any particular per cent.

Q. Do you think it is applied to garments which range in the wool content from nothing to 99 per cent?

A. I know of no such percentage as that range.

Q. What would you say the extreme range was?

A. I should apply it to our own proposition, from 25 per cent up.

Q. You have stated that. So it means nothing definite as to the percentage of wool?

A. No, sir.

Q. I think you have testified that the garments which you label "natural worsted" have a higher and finer quality of wool than these other labels represent?

A. No, I would not say that, not finer quality, a different process of yarn making, but not a finer quality necessarily.

Q. Can you state the differences in the process of making  
151 this worsted yarn to which you apply the label, when it is manufactured into a garment, the natural worsted and the yarn in the garments which you label natural wool?

A. The difference is simply one of process. One is made on what are called combs. The worsted yarn is made by worsted manufacturers on combs which handle the stock differently from our cards. They are getting at the same thing, the straightening and laying parallel of the fibres of the fabric for their mixtures, mixing the two together, but they produce a different effect because of the process.

Q. So the garment as respects the wool in it, aside from the process, may not be superior in the goods which you label "worsted" over those which you label "wool"?

A. It is superior in this respect, not in respect to fineness, but in respect to wearing qualities, because the fibre of the worsted is longer.

Q. Then the term "fineness" in your use applies not to the length of the fibre?

A. Not to the length of the staple.

Q. But rather to the fineness of it—that is, the size of it?

A. The size of the fibre.

Q. Now to get an idea of the extent of your business, Mr.  
152 Gaylord, the Winsted Hosiery Company has been making underwear how many years?

A. 38 years.

Q. Can you state approximately its turn-over in the last five years?

A. That question was for the last three years, the question that you put to us.

Q. Very well, for the last three years.

A. As we were talking only about shirts I have not included our hosiery business.

Q. Does this cover all your underwear exclusively?

A. I have taken only the underwear part of it.

Q. That is all the underwear, excluding hosiery?

A. Yes; approximately. For the three years previous to October 31, 1918, the output of underwear of this class which we are speaking of was two and a half million dollars.

Q. Annually?

A. No, sir; for the three years.

Q. Where are your goods sold principally, if there is a difference in territory?

A. We sell them in every State in the Union.

Q. Do you sell to jobbers?

A. To retailers.

153 Q. All your sales are direct to retailers?

A. Of underwear.

Q. And your business extends to most of the States?

A. I think to every State in the Union.

Q. Have you used other labels than these on similar goods—other than these which we have discussed?

A. I find no record of any others. I would not say about twenty years ago.

Q. No; but within the last five years.

A. Our policy has been the same for the last five years as the last twenty-five years.

Q. You have continuously used these labels for the last five years on the goods you have described?

A. Yes.

Q. And no others?

A. And no others. I will qualify that. We have made colors. We call them tan merinos. We are not making them now, and you did not ask for them.

Q. No.

A. We have used labels referring to the color.

By Examiner McKEAG:

Q. The contents were no different from these you mention?

154 A. Not as regarding the percentage of wool. They were practically the same.

By Mr. CLARK:

Q. In filling your orders from retailers you have put up the goods in boxes similar to this Exhibit 2 and shipped them, these labels appearing on the boxes?

A. Yes.

Q. Are you connected in business with the New England Knitting Company?

A. I am the treasurer.

Q. You are personally; but is the Winsted Hosiery Company?

A. They are not. They are entirely separate.



Q. Have you marked any of these goods in different ways than these labels, at the request of dealers, at the request of retailers?

A. Sometimes retailers furnish their own labels and we put them on.

Q. Do you know of any instance where a request has come from retailers that the labels be changed?

A. Not changed. They have furnished their own labels sometimes.

Q. That is, they have furnished them to you, and you have put them on the boxes before they were shipped?

A. Yes.

155 Q. Do you recall some of those labels that you adopted or put on the boxes at the retailers' requests?

A. I have no recollection of any details regarding them.

Q. Well, generally?

A. They generally correspond to our own wording, with some additional name like a trade-mark of the customer. Some customer has a particular trade-mark and he wants the label with his brand on it, and he furnishes the labels, but the wording is usually similar to our own.

Q. That refers to the box or the garment?

A. That refers to both, but I was speaking of the box. Many of our customers have a cloth label on the garment, but that usually gives no details regarding the garment.

Q. To be specific, have you had any request from a retailer that the term "merino" should not be included in the labels on their boxes?

Mr. MOLLOY. Within what time? Let us limit ourselves on that.

By Mr. CLARK:

Q. Within the last three years.

Mr. MOLLOY. I object to a question founded on anything since this order went into effect.

156 Examiner McKEAG. Specify before and after, and then we can determine that.

A. Within the last three years, prior to the issuance of this order.

My Mr. CLARK:

Q. Yes; October 29, 1919, is the date of the order, I think.

A. I have no knowledge regarding it anyway.

Q. Would you have if such request had been made to your company?

A. If we had the record still at the mill, we would have, but I doubt it, for this reason, that they usually send the label and we put it on, and that ends the transaction. If there are any labels left over they are thrown away.

Q. Would you be consulted as to any change of label at the request of retailers?

A. Not if on the face of it it looked all right. If one of our customers asked us to put on a label reading "all wool" we would not do it, and it would be referred to me; but if somebody asked to put

on a label that read practically as ours read, it would go through and I would not know anything about it.

Q. If they asked you to drop the term "merino"?

A. I would not know anything about it necessarily.

Q. Who attends to that?

157 A. The shipping clerk or the man in charge of the packing.

Q. Will you ascertain if there have been such requests?

A. I will make a note of it.

Q. I wish you would make that cover the period of time down to the present. I do that because the courts have taken into account the practice of respondents in these proceedings subsequent to the time alleged.

Mr. FRANCE. Is not that exceeding the objectionable? The commission makes an order which probably many manufacturers acquiesced in, until it is tested, as in this case. It is offered also as evidence tending to prove—

Examiner McKEAG. It is a matter for the court to determine, not for us.

Mr. MOLLOY. The date should appear so that those who pass on the matter can judge for themselves.

Examiner McKEAG. If the witness has knowledge of something happening since the date of the order, we will not have to look up the record.

Mr. CLARK. The order was entered January 29, 1920.

By Examiner McKEAG:

Q. Has any retailer requested you to take the word "merino" off the label?

A. Not to my knowledge.

158 Mr. CLARK. I think that is all.

By Examiner McKEAG:

Q. Have you had any complaints from retailers, or any customers of retailers, with reference to the wool in the garments sold by you at any time?

A. I do not know that we have had complaints. We have had letters occasionally from a customer asking as to the percentage of our merino garment so and so, which we have always given them.

Q. Have any of those customers given you information at variance—that is, given you any information with reference to representations made by retailers, which representations were at variance with the facts?

A. Our customers are retailers.

Q. But I mean the customers of the retailers.

A. The consumers?

Q. Yes.

A. I do not recall anything of that nature.

Q. Is it practicable to stamp upon the garment itself the percentage of wool and cotton in it?

A. It is not.

Q. Is it done anywhere?

A. It is not.

159 Q. Is it customarily done in Canada?

A. I think not. I know very little about it.

Q. Do you ship any goods to Canada?

A. We have never shipped underwear there. We have shipped hosiery there. They do not require it.

Q. They do not require that?

A. No.

Cross-examination by Mr. MOLLOY:

Q. Mr. Gaylord, what do you understand to be the meaning of the word "merino" as used generally in the trade, and known publicly as it applies to garments in your industry?

A. A mixture.

Mr. CLARK. I object to his expressing an opinion on that.

Mr. MOLLOY. You have asked him.

Mr. CLARK. No; I have not asked him.

Examiner McKEAG. He may answer subject to the objection.

Mr. CLARK. I object on the ground that he is not an expert, at least as to the public knowledge and understanding of the term.

A. A mixture of wool and cotton.

By Mr. MOLLOY:

160 Q. Regardless of the percentages of wool or cotton in the fabric?

A. Yes.

Mr. MOLLOY. That is all.

By Examiner McKEAG:

Q. On what do you base your statement with reference to the knowledge of the public as to that?

A. On its general use for the last thirty-five years.

Q. By the trade?

A. By the trade, and also the government's use of the same term. Of course they do not look much to the public at large perhaps, but every man, woman, and child that works in a hosiery mill or a mill of any kind making these mixtures never use any other term.

Q. But the public do not know anything about the mills or the mixtures; and merely using a descriptive name indicating the quality of the garment as to wool or cotton? You have no knowledge about those?

Mr. MOLLOY. One moment. There is nothing in the evidence to show that the general public do not know the meaning of the word "merino." The dictionaries themselves define that.

Examiner McKEAG. I wanted to know the knowledge of the witness.

161 A. I will say that since this controversy arose I have asked a good many people not connected with the trade in any man-

ner what they understood to be the meaning of the word "merino." In almost all instances they knew what it meant.

By Examiner McKEAG:

Q. Were they people in the New England States?

A. I met more of them than from anywhere else, but I have met some others. The women who bought the underwear knew that. That is, I have asked women that never worked in mills what merino is, and they said, "Why, a mixture of wool and cotton."

By Mr. CLARK:

Q. You have stated, I think, that in the past underwear manufactured by you has contained as low as 25 per cent of wool, and I think you also stated that these labels which we have put in evidence are the labels which have been used by you, on all your men's undershirts.

A. I do not quite know what you mean by "all." They are type labels that represent all of our different grades.

Q. Have these labels one or the other of them been applied to these garments which have in the past contained as little as 25 per cent wool?

162 A. The ones reading "merino" have.

Mr. CLARK. That is all.

(Whereupon, at 12.15 p. m., a recess was taken until 2 p. m.)

#### AFTER RECESS.

The hearing was resumed, pursuant to the taking of recess.

ERNEST LEVIT was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Mr. Levit, what is your present employment, please?

A. I am buyer for Rothenberg & Company.

Q. What is their business?

A. General merchandise.

Q. Retail?

A. Retail general merchandise.

Q. Located where?

A. 40-42 West 14th Street, New York City.

Q. You are the general buyer?

A. No, buyer in a certain department, underwear, hosiery, and men's furnishings.

Q. How long have you been employed in that capacity?

163 A. With this concern six years.

Q. Prior to that had you been in the retail furnishing business?

A. I have been in the retail furnishing business.

Q. In what capacity?

A. As buyer.

Q. How many years?

A. I have been about 28 years in the business.

Q. As salesman also?

A. Yes.

Q. As salesman I suppose you have had occasion to sell men's underwear?

A. Yes.

Q. I presume you are familiar with the manufacturers' labels on various makes of underwear?

A. Yes; certainly—that is, in a general way.

Q. Some of them, I understand, use words which are descriptive of purport to describe the quality or the composition of the goods, much as "merino," "wool," and "worsted."

A. The boxes are so marked; yes.

Q. On the other hand, some such labels put on manufacturers' boxes are silent as to the contents of the goods, are they not; that is, they do not go into the question of whether they contain wool or cotton?

164 A. They do not.

Q. Do some of these manufacturers' labels that are on the boxes which they supply to the retailer, where the goods are made of cotton and wool, specify that there is cotton as well as wool?

A. Nowadays they are beginning to use them, but I can not say they have done so in the past. It was in more general terms. It was not specifying any proportion of wool or cotton or anything else.

Q. In your past experience as salesman particularly, you have come in contact with other sales people in the business of selling underwear and also with customers, of course. What in your opinion is the understanding of the public—that is, the purchasers of underwear—of the term "natural merino"?

A. The word "natural"—

Mr. MOLLOY. I object to that as asking the witness for a conclusion and attempting to have him state the decision that is involved in the issues of this case. That is a matter for the commission to determine.

Mr. CLARK. My theory is, Mr. Examiner—

Examiner McKEAG. Is this witness called as an expert?

Mr. CLARK. Yes, to the extent that I assume he has had knowledge, has had unusual opportunities of observation and  
165 knowledge on the subject under discussion.

By Examiner McKEAG:

Q. Have you in your experience in this line had occasion to discuss with other salesmen and with the consuming public the different kinds of underwear by name?

A. Well, not discussion in the sense that you mean of argument.

Q. No; I mean in any shape or form.

A. In selling goods we do not discuss that at all. We simply state a fact. The customers do not know.

Examiner McKEAG. I think you had better develop a little more of his expert knowledge before you ask him the question.

By Mr. CLARK :

Q. Has the subject of the meaning of such labels as I have stated been brought up in the course of your experience in selling, as a salesman, or anywhere?

A. I can not say that the labels have been brought up in discussion at all.

Q. Well, the terms used in them.

A. Salesmen do not show the labels on the box. The labels on the box mean very little to a salesman. In showing underwear we take the underwear out of the box and talk about the  
166 merchandise. The label itself very seldom gets into the discussion at all.

Q. I repeat my question as to what your idea is of what this term "natural merino" means to the purchaser of underwear?

Mr. MOLLOY. I object to that, that he is not qualified any further than when my first objection was made.

Examiner McKEAG. I think the point is well taken so far. I suggest that you ask him if he has an opinion about this, and then let him describe how he acquired the opinion, and then we can determine whether or not he ought to give the opinion or not. That is the legal way of doing it as I understand it.

Mr. CLARK. I should like to take a short cut if we can.

Mr. MOLLOY. I have no objection to your asking him what he understands the word "merino" means. That seems to be the short cut to it.

Examiner McKEAG. I think he ought to be qualified a little more as an expert before you ask him.

By Mr. CLARK :

Q. From your experience as a salesman and otherwise in connection with the retailing of underwear, have you an opinion as  
167 to the general understanding of the public as to the meaning of the term "natural merino" as applied to underwear?

By Examiner McKEAG :

Q. Answer that yes or no.

A. I have an opinion; yes.

By Mr. CLARK :

Q. Will you state on what that is based, and how you acquired it generally?

A. That would be hard to say. It is general usage. I believe it is accepted as general usage.

Q. By the public?

A. Among salesmen, not the public. I can not answer for the public. Among salesmen the word "natural"—

Q. I am not asking you on that, what your understanding is of the meaning. I am asking you if you have been able to form an

opinion from your experience as to what the public understands by the term "natural merino"?

A. Eliminating the word "natural" I can answer the question.

Q. Very well, answer the question—by the public.

A. Cotton and wool mixed.

Q. That is your opinion, is it?

A. Yes.

Q. That the public understand it to mean cotton and wool?

A. Cotton and wool.

168 Q. How much cotton do they understand it to mean?

A. As a rule—this is merely my observation—we call merino I should say about half and half. I do not know why I ever arrived at that conclusion at all, but that has been kind of accepted.

Q. You say "we" understand it. Whom do you mean?

A. The salesmen.

Q. I am talking about the public.

A. When we tell them that they accept it. In some way they get the information from us, you know.

Q. Before they have been informed by you, have you had any experience which led you, independent of your understanding, to form an opinion as to what the public understood?

A. I can not say.

Q. As to what the public understood?

Mr. MOLLOY. He has already answered it.

Mr. CLARK. He says he has no experience which enables him to tell what the public understands.

Examiner McKEAG. I think he stated, among salesmen.

Mr. MOLLOY. You are cross-examining your own witness after you have got a direct answer.

Mr. CLARK. You can have the benefit of it.

169 Mr. MOLLOY. You are cross-examining your own witness to discredit the previous testimony given by him.

Mr. CLARK. My purpose is simply to make it perfectly clear to this witness what I am getting at and to have him express what he means.

By Mr. CLARK:

Q. My question is directed to your experience, as enabling you to judge of what the purchasing public, as distinguished from the salesmen and retailers, understand, independently of your understanding as a salesman, what the public understands by the term "natural merino," or "merino."

A. I have no means of answering that question as to the public. "The public" is a very broad assertion. That means everybody. We tell them that it is a merino garment. Salesmen have been telling them that for years and years, and they make the remark, they say "How much wool is in it?" We say "About 50 per cent." I imagine that the customer, the consumer, or the public, would come to that conclusion, the same. Salesmen have had it for years.



Q. But their impression on that subject prior to the information you give them, you cannot say?

A. I have never had a customer bring it up at all.

170 Q. As a fact do you as a buyer know to how low a percentage of cotton the term "merino" would apply?

A. I have no knowledge at all. I have no knowledge of the construction of underwear. I have never seen it made.

Q. Don't you know when you purchase underwear how much wool and how much cotton is in it?

A. I used to think I did. I know less now than I did years ago.

Q. What do you go by?

A. I go by the feel.

Q. So for all you know a garment labeled "merino" may contain very little wool?

A. It may contain very little.

Q. As a fact do you know of any instance where it contained no wool?

A. Well now, I should say no. I would not call that merino.

Q. You do not know of any such garments being sold under the label "merino"?

A. I have seen "merino" labels on boxes which contained no wool in my opinion.

Q. From your experience as a salesman have you an opinion as to the public's understanding of the term "gray wool" as applied to underwear?

171 Mr. MOLLOY. I object to that as calling for a conclusion from the witness that is the subject-matter to be determined by this commission, and prejudging the issues involved in this case.

Mr. CLARK. I urge that question. It will apply to a good many others, and I urge it on this ground. The commission in this case, as Mr. Molloy says, is to decide the facts as to what the public does understand from these terms, and the commission are really in the position of a jury in that respect, as I understand, and I submit that this testimony is competent and admissible on the theory that this witness has more knowledge of the subject than the jury has, and that he can testify as to his opinion as an expert. His peculiar qualification is that he has come in contact with the public in the sale of underwear, and it is the testimony of experience; and there is this peculiarity about this subject which I think has been recognized by the courts which have admitted similar testimony, that it is impracticable to call the public. The courts I think have recognized that in similar cases, and so they have said that the only feasible way to get the evidence before the court on these subjects is to take the evidence of those who are in a position, from their experience and occupation, to testify to the facts. In other words, it is as good evidence as we can get in the case.

172 Examiner McKEAG. As a general rule expert testimony is aimed directly at the conclusion which the court or the jury must draw, and is subject to cross-examination by the adverse party,

and is admissible for what it is worth. Subject to counsel's objection the testimony will be admitted.

Mr. MOLLOY. May I make that as a general objection to the course of testimony of this kind, so that we need not unnecessarily encumber the record? And I will reserve the right to inject it wherever I may desire in the midst of the testimony.

Mr. CLARK. Sure.

Examiner McKEAG. Certainly. Counsel's objection will be noted to any and all of this testimony.

Mr. MOLLOY. And as we may later desire.

Examiner McKEAG. Yes.

Mr. CLARK. Please repeat my question.

(The stenographer read the question, as above recorded, as follows:

"From your experience as a salesman have you an opinion as to the public's understanding of the term 'gray wool' as applied to underwear?"

A. No; I have no opinion as to what the public opinion is.

Q. What does it mean to you?

173 A. Well, "gray wool" should be all wool. That is my opinion as far as the term "wool." It should represent it as being a wool garment composed entirely of wool, but we would not have accepted that necessarily. It never came before us as a question.

Q. From your experience have you an opinion as to the public's understanding of the term as applied to underwear, "natural wool"?

A. The same answer would apply to that question as to the previous question.

Q. What is your understanding of it?

A. I should answer the same way again.

Q. Do you wish to make the same answer as to the term "natural worsted"?

A. Again I do not know. Worsted is somewhat like the term "merino" to the sales people. I do not know how we have arrived at the conclusion, except that it is a kind of a general understanding of the word, you know. Of course it should be all wool, but as a trade term among the sales people it is considered a mixture.

Q. Have you an opinion as to what the public understand?

A. The public in general, as far as I have derived from selling, have accepted it the same way. When we say "worsted" 174 to them they say "that is not all wool, is it?"

Q. I judge that you think that the salesmen have been educating the public as to the trade meaning of these terms.

A. The public have been educated by the salesmen. They have arrived at our conclusions, from our remarks, perhaps. There has been no propaganda, necessarily.

Q. In arriving at your understanding of the terms, what do the questions indicate as to what they understand?

A. "Worsted" has been understood as being some cotton in the garment. It does not necessarily mean all wool.

Q. What is your opinion as to the public's understanding of the label "Australian wool"?

A. Well, we generally tell the public that the Australian wool is a better quality than American wool—longer fibre.

Q. And as to whether it is all wool or not?

A. We very seldom tell the public a garment is all wool, because it will lead to no sale. They do not care for all-wool garments. We are very careful not to say "all wool" at the start off. That is poor salesmanship.

Q. What do you understand was the origin of the term "merino"?

A. As I understand, merino is a very fine quality of wool. It is a merino sheep.

Q. From your observation, what is the reason which leads you to think that the public does not still attribute that meaning as applied to underwear?

A. As I say, they have come to accept the term, as far as I have observed from my own connection with the public, as being part wool and part cotton.

Q. They have accepted it you mean on the statement of the salesmen?

A. I imagine that is where they get their opinion. They could not get it from anyone else on that line, because "merino" is wool.

Q. What do you understand to be the proper meaning of the term "worsted" aside from any trade understanding?

A. Frankly, I don't know.

Q. Do you know any objection as far as the interest of the retailer goes to expressly stating that merino is wool and cotton?

Mr. MOLLOY. I object to that question. That is all outside of the issues in this case, and calling for a conclusion of this witness that has no bearing on the issues of the case.

Examiner McKEAG. He may answer subject to your objection.

Mr. MOLLOY. And furthermore that the witness has already stated that the purchasing public understand it to be a fabric made of wool and cotton.

By Mr. CLARK:

Q. Then I press the question. Is there any objection as far as rate-making is concerned, to stating that meaning?

A. Do you mean, would there be any objection to stating it on the box, or on the label?

Q. Yes.

A. You ask me what the public—

By Examiner McKEAG:

Q. No; he means is there any objection on the part of the retailer.

By Mr. CLARK:

Q. You state that in your opinion the public, by the information which it obtains from the salesmen, understands merino to be wool and cotton. Now, if on the contrary the public understood that it

meant wool, there would of course be some object to the retailer in his sales, in withholding the fact that it was cotton as well as wool. I ask you if you think from the point of view of the retailer there is any objection to adding the term "cotton" to merino?

A. My personal opinion is that the word "merino" is so well understood that there would not be any use to add the word "cotton" to the word "merino."

Q. I ask you if there is any objection in the interest of the retailer?

A. None whatever from me. As to retailers, I can only speak for myself.

By Examiner McKEAG:

Q. Do you ever handle any underwear made from merino wool, that is the fleece from merino sheep?

A. I could not tell you. I don't know.

Q. Did you ever hear of it?

A. I suppose there is some made. I could not tell you.

By Mr. CLARK:

Q. You do not know what the distinction is in the use of these labels between "natural worsted" and "natural merino"?

A. I don't know what you mean by the distinction. They are two different items entirely.

Q. What is the difference in what they indicate or signify?

A. In the garments themselves?

Q. Yes.

A. In the appearance of the garment. They differ in appearance entirely.

Q. How about the quality?

A. Worsted is a kind of woven thread that gives a different appearance entirely to the garment than merino. Merino generally shows a nap and the worsted does not.

Q. Do you know what the difference is as to the amount of wool in each?

A. That varies with the garment. "Worsted" has been put on all sorts of boxes, I suppose, from a very small proportion of wool to very nearly all.

Q. The same as merino?

A. They have been used in the same way.

Q. Suppose a retailer has a lot of underwear in a box with the label "natural merino" on it. Don't you think that gives an opportunity to him to represent the goods as being all wool?

A. As a salesman I have never seen it represented as being all wool.

Q. I ask you, not from your own experience, but whether you do not think it is capable of that use?

A. I do not think so. As I stated before, "merino" has been generally accepted, in my opinion, as being a term for a mixture of wool and cotton.

179 Q. Then since this term "merino," according to your statement, is applied to all degrees of cotton and wool mixture—that is, as to the percentage of cotton—it does not mean anything in particular, does it, except that you state it is a mixture?

A. That is all.

Q. To the trade?

A. That is all.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Levit, it means the same thing to the purchasing public, doesn't it, as you have come in contact with it as a salesman and the head of a department, that you testified to?

A. That the term "merino" means a mixture?

Q. Yes.

A. That is my observation; yes.

Q. Have you during your twenty years' experience ever had any objection made to you by a customer that an article marked "merino" did not contain 100 per cent wool?

A. Well, I would not say "never." All I can do is to repeat that they accept the term as meaning a mixture.

Q. And that is generally accepted in your experience of twenty years?

180 A. Yes.

Q. When did you first become employed in the hosiery and underwear business?

A. As a salesman?

Q. Yes; or in any capacity.

A. About twenty-five years ago.

Q. With whom did you start in business in that kind of work?

A. The Hub, Chicago.

Q. That is one of the large retail stores in Chicago?

A. Yes.

Q. While you were employed there, in what capacity were you employed?

A. Salesman.

Q. Salesman in the underwear and hosiery department?

A. The underwear department.

Q. As such salesman you came directly in contact with the customers of the store?

A. I did.

Q. How many years were you employed by the Hub?

A. About five years, I think.

Q. And from that concern where was your next employment?

A. With the Washington Shirt Company of Chicago.

Q. Was that a retail store?

181 A. Yes.

Q. Were you employed there in the capacity of salesman?

A. Salesman.

Q. In what department were you employed?

A. In the general sales. They sold all merchandise for men.

Q. As salesman in that store you had the handling of men's underwear and hosiery?

A. Yes.

Q. And came in direct contact with the customers of the store?

A. Yes.

Q. How many years were you employed there?

A. About five years.

Q. And your next employment?

A. Siegel Cooper & Company of Chicago.

Q. How many years were you employed there?

A. About eight years.

Q. In the men's underwear and hosiery department?

A. I was in the men's furnishing.

Q. And that had charge of men's underwear and hosiery?

A. It took in men's underwear and hosiery.

Q. In what capacity were you employed there?

A. Assistant buyer.

182 Q. And in such position did you come in contact with the customers generally of the store?

A. Not so generally as before. Naturally as a salesman I came in closer contact with the buying public.

Q. But you occasionally came in contact with the purchasing public?

A. I did, yes.

Q. From that place where did you go next?

A. The 14th street store, New York City.

Q. And was that known as Henry Siegel & Company?

A. Yes.

Q. How many years were you employed there?

A. Just before its failure I came down here. I came down here as a buyer for those departments.

Q. And how many years were you there?

A. They closed up about six months after I went with them.

Q. And from there you went to your present place?

A. As a buyer.

Q. In both these last named places you have been employed as buyer or assistant buyer?

A. As a buyer.

183 Q. In that capacity you have handled men's underwear and hosiery generally?

A. Yes.

Q. During the course of your experience have you purchased for the account of your employers any of the products manufactured by the Winsted Hosiery Company?

A. You mean during this entire period?

Q. Yes.

A. I never purchased, no, not from them.

Q. Have you handled any of their product in the department in which you worked during the period of your experience?

A. Yes, I have.

Q. I show you Exhibit 1, which purports to be a sample of a fabric manufactured by the Winsted Hosiery Company, with the label which appears on the box in which the garment is contained pasted on it, and ask you whether in your experience in the employ of your various employers you have handled any of the products similarly marked?

A. I think I have. Do you mean this particular label?

Q. That particular label.

A. I have not handled worsted goods seven or eight years, so I am kind of hazy about that particular label. They may have changed the label since then.

184 Q. Where the Winsted Hosiery Company have used the word "merino" as they have on this label on this sample, have you had any experience with merchandise similarly marked by them?

A. I have; yes.

Q. I show you Exhibit No. 3, which also uses the word "merino" as part of the label, and ask you whether you have handled merchandise similarly marked, the product of the Winsted Hosiery Company?

A. I have.

Q. In handling merchandise so marked by the Winsted Hosiery Company, as I understand your testimony it was that the word "merino" meant a garment manufactured from a mixture of cotton and wool.

A. That would be my understanding.

Q. And when you handled that merchandise you so regarded that merchandise?

A. So I did.

Q. And in dealing with that merchandise to the customers of the various stores in which you handled it, as far as your experience goes, you understood it to be a garment made of a mixture of wool and cotton?

A. I think they did.

185 Q. Would the description of the words "cotton and wool" add anything more to the meaning of a fabric marked "merino" than does the word "merino"?

A. That would not be my impression.

Redirect examination by Mr. CLARK:

Q. Do you recall any instance of a customer who had purchased underwear from you or from sales people in any place where you were employed having purchased it under the label "merino," "natural merino," or "natural worsted" complaining that it had been represented to him when he purchased it as all wool?

A. That might have happened where a customer had complained.

Q. Do you have some recollection of it?



A. I do not recollect any particular occurrence.

Q. But you think it was quite possible?

Mr. MOLLOY. I object to that, what might be possible. Limit it to the issue in this particular case, to the product manufactured by this particular respondent. Not generally. We are not dealing with that.

Mr. CLARK. We are dealing with these labels.

186 Mr. MOLLOY. We are dealing with the product manufactured by this respondent.

Mr. CLARK. You have not confined your examination at all to that. You have said "similar labels."

Mr. MOLLOY. By this defendant.

By Mr. CLARK:

Q. You are not able to say that none of the public understand the term "merino" or "natural merino" to mean all wool, are you?

A. I am in no position to understand except what I have handled myself, the public I have handled myself. In my conversation with them I always give them the impression that it is something that has a percentage of wool, in my opinion. I do not say that is the correct opinion. That would be my opinion at that time on that particular garment.

Q. But you can not say that all the public who are interested in the quality of underwear which they buy understand "merino" to mean cotton and wool?

Mr. MOLLOY. I object to this line of examination by counsel on redirect. I think the question he is asking is entirely out of order as not being a proper subject on redirect examination.

Mr. CLARK. You have asked him questions along that line.

187 Examiner McKEAG. Answer the question.

By Mr. CLARK:

Q. I want to know whether you feel able to say that it is the universal idea of the purchasing public that "merino" means wool and cotton?

A. My conclusion is that it does mean wool and cotton and that the public I have handled so understand it.

Mr. CLARK. That is all.

By Examiner McKEAG:

Q. Suppose someone came into the store and wanted to buy an all-wool garment, how would he know he was getting an all-wool garment?

A. From my own knowledge of real wool I think I could tell whether it was all wool.

Q. I had pneumonia once, and the doctor told me to get an all-wool undershirt. Would it be possible to get an all-wool undershirt?

A. You are getting technical now. I am not an underwear manufacturer.

Q. You know whether they are on the market?

A. I imagine they are. In fact we have them in our store marked "all wool" and I imagine they are all wool—so marked on the label.

Q. The public must depend on what the salesman tells them with reference to the percentage of wool and cotton?

A. Yes, entirely.

Q. And the salesman may be innocently wrong at times?

A. The chances are all the time, because he has no real knowledge of what goes into the garment.

Q. And the public is buying upon the word of the salesman?

A. Certainly.

Mr. CLARK. I think that is all.

GORDON A. O'NEILL was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Buyer.

Q. For whom?

A. Lord & Taylor.

Q. How long have you been employed as buyer there?

A. Five years and a half.

Q. Prior to that in what business were you?

A. The same business.

189 Q. A buyer?

A. Yes.

Q. Have you had experience in any other capacity in relation to the general clothing business?

A. No, always in the furnishing business; underwear, hosiery and furnishings.

Q. Have you ever been employed as a salesman?

A. Yes.

Q. And where was that?

A. By McCreery and Lord & Taylor.

Q. About how many years did your experience as a salesman cover?

A. About twelve years as a salesman and eight as buyer.

Q. As salesman you handled underwear, did you?

A. Yes.

Q. Men's underwear?

A. Yes.

Q. And in that capacity you became acquainted with the terms used by manufacturers in labeling their underwear, such as "merino," "natural merino," "natural wool," "gray wool," "natural worsted," and "Australian wool"?

A. Yes.

190 Q. And you had an opportunity to observe and gain some knowledge of the purchasing public's understanding of those terms?

A. Yes.

Q. In your opinion based on that experience what does the general public understand by the term "natural merino" as used in underwear?

A. Why, the public would figure that that was a mixture.

Q. All of them?

A. Yes.

By Mr. MOLLOY:

Q. A mixture of what?

By Mr. CLARK:

Q. A mixture of what?

A. Of wool and cotton.

Q. In any particular proportions?

A. No.

Q. Might it be all cotton?

A. No; it would not be all cotton.

Q. Might it be 90 per cent cotton?

A. No; I would not say—it is usually figured to be a mixture of possibly about half wool and half cotton.

191 Q. How is all cotton underwear labeled?

A. It is marked "cotton."

Q. And 90 per cent cotton underwear, how would that be labeled?

A. I don't know, because we never really handled anything that was 90 per cent cotton.

Q. What is the largest percentage of cotton you have handled?

A. It is usually about 50 or 40.

Q. And some in which the wool is more than 40 or 50?

A. Yes.

Q. And the term "merino" is used by the trade and understood as applying to all grades as far as the proportion of wool and cotton goes?

A. Yes.

Q. Now as to the term "natural wool" as used in labels on boxes which manufacturers furnish with their garments, what in your opinion is the general public's understanding of that term?

A. It would be all wool.

Q. And as to the term "gray wool" what is the public's understanding generally?

192 A. That it would be wool.

Q. And the term "natural worsted," what is the general public's understanding?

A. Natural worsted they would figure that was a mixture.

Q. And the term "Australian wool"?

A. That would be all wool.

Q. In the underwear which you have handled from various manufacturers is there any uniformity in the label as to the use of terms which describe the content? Do all manufacturers put the same

descriptive term, such as "merino" or "natural wool" or do some omit anything that refers to the contents—that is, the fibre?

A. I think that some omit it.

Q. In your observation do any of them specify in a case of a mixture of wool and cotton, that it is wool and cotton?

A. Yes.

Q. Do you handle any all-wool underwear?

A. Yes; we do; foreign underwear.

Q. Imported?

A. Yes.

Q. How is that marked?

A. It is marked "wool," or "natural wool."

193 Q. Not "merino"?

A. No.

Q. Can you tell what percentage of wool there is in these mixed garments?

A. Do you mean by my examining the garment?

Q. Yes.

A. No; I would not be able to tell that.

Q. How near do you think you could come to determining the percentage?

A. That would be hard to say.

Q. In your experience have you known of instances where the purchasers of underwear marked "merino" or "natural worsted" have been as a fact misled?

A. No.

Q. Misled into the belief that they were all wool?

A. No, sir.

Q. You have charge of the sales people, have you?

A. Yes.

Q. Have you observed any instances where they have had the understanding that goods marked "merino" or "natural merino" or "natural worsted" were all wool?

A. No, sir.

194 Q. Have you known of instances of that kind outside of your own shop?

A. No; I have no knowledge of any such instances.

Q. Do you handle any imported mixed goods; that is, cotton and wool?

A. No; not right now we have not.

Q. Do you recall having handled such?

A. Yes; we have had it.

Q. How were they marked as far as the labels went?

A. I believe they were marked just what they were, cotton and wool mixture.

and domestic goods containing both wool and cotton were sometimes

Q. I understood you to say that some of these imported goods marked "wool and cotton." Have you observed any preference of

the purchasing public as between mixed goods marked "wool and cotton" and mixed goods marked "merino" or "worsted"?

A. No.

Q. From the point of view of a retailer do you know of any objection to advertising the terms specifying the contents of the goods, wool and cotton?

A. No.

Q. Don't you think it would prevent any possible—

195 Mr. MOLLOY. I make the same objection I made before to the question asked of the previous witness, on this line of questioning—to the question if he sees any objection.

Examiner McKEAG. From the point of view of the retailer?

Mr. MOLLOY. Yes.

Examiner McKEAG. You may ask the question.

By Mr. CLARK:

Q. Don't you think it would tend to prevent any misunderstanding on the part of the public?

A. Yes.

Q. And that misunderstanding is possible, in your opinion?

A. Yes.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. There has been no misunderstanding as far as your experience indicates as to the knowledge of the customers generally in buying a merino garment, of understanding that it is a mixture of cotton and wool?

A. That is right.

Q. So that to mark it cotton and wool would not add any-  
196 thing to the present meaning as the purchasing public understand the use of that term.

A. No; that is right.

Q. So that it would merely be a matter of optional description to bring home to the purchaser what the garment contents were?

A. Yes.

Q. You have had twelve years' experience as a salesman?

A. Yes.

Q. Eight years as a buyer?

A. Yes.

Q. The house of Lord & Taylor and the house of McCreery are the big retail shops of this city that we know by those names are they not?

A. Yes.

Q. How do the gentlemen's underwear and furnishing departments of Lord & Taylor and McCreery compare to the similar departments in the other large department stores?

Mr. CLARK. I object to that as far as it includes McCreery.

Mr. MOLLOY. On what ground?

Mr. CLARK. He has not had experience there.

197 Mr. MOLLOY: He was employed there. He was employed in both places.

By Mr. CLARK:

Q. Were you formerly employed in McCreery's?

A. Yes.

Mr. CLARK. I withdraw my objection.

Mr. MOLLOY. I want to put the picture on the record that Lord & Taylor and McCreery are two of the big shops here.

By Examiner McKEAG:

Q. Answer the question.

A. What was the question?

By Mr. MOLLOY:

Q. How do the gentlemen's furnishing departments of the houses of Lord & Taylor and McCreery compare in size with the same departments in other large stores here in the city?

A. Why, they are all just about the same size.

Q. Approximately what would be the turn-over in business in your department in Lord & Taylor's for a calendar year?

Mr. CLARK. I object to that unless it is shown that he has knowledge.

Examiner McKEAG. You may ask him if he knows.

198 By Mr. MOLLOY:

Q. I am asking you to state the average in round figures.

A. In a word I should say about six times a year.

Q. In dollars and cents what would be the volume of business in the calendar year, say of 1919?

A. I don't know that exactly.

Q. In round figures.

A. I should say possibly about \$160,000.

Q. And in McCreery's would that compare pretty much the same as Lord & Taylor?

A. Yes; there would be very little difference on them.

Q. During the twelve years of your employment as salesman in McCreery's and in Lord & Taylor's you came constantly in contact with the purchasing public who bought their wares of those stores?

A. Yes.

Q. In many instances you waited upon them for their desired purchases?

A. Yes.

Q. And as buyer for the same stores, in these departments, you came in contact with men generally in the underwear trade?

199 A. Yes.

Q. You say that in this experience you handled the foreign product. Do you know merchandise manufactured by a concern known as Stuttgart, a German manufacturer?

A. Yes.

Q. Have you ever handled any of their "merino" merchandise?

A. I think we have; yes.

Q. And the merchandise that they put up labeled "merino," is their fabric a mixture of cotton and wool the same as the merino fabric manufactured here?

A. I believe it was. I have used very little of them.

Q. When they put up an all-wool garment is it not a fact that they label it "all wool" just the same as Jaeger, another German manufacturer, labels his product?

A. Yes.

Q. Isn't it also a fact that when an all-wool garment is made and put up by an American manufacturer it is also labeled "all wool"?

A. I don't remember any.

Q. Have you ever come in contact with any merchandise that was put up with a label "all wool" pasted on the box?

A. Foreign.

200 Q. You have not handled any of the American product labeled "all wool"?

A. No; I don't remember any that I have handled.

Redirect examination by Mr. CLARK:

Q. Don't you know that Stuttgart has dropped the term "merino"?

A. I did not know it, because we have not used much of that in the past few years.

Q. Have you used enough to know what labels are used by him?

A. No; I have not.

Q. So you can not say whether they label their mixed goods "merino" or not?

A. In recent years, no; I have not had it in the quotations.

Q. Can you say with positiveness from your knowledge that they formerly used the term "merino" as applied to wool and cotton?

A. I am not quite positive of that as to the Stuttgart. I would not like to say positively on that.

Q. You know the fact, don't you, that there is a grade of wool known as merino wool?

201 A. Yes.

Q. How do you explain the use of the term "merino" as applied to cotton?

A. Why, it is generally known that merino is a mixture of wool and cotton.

Q. Known to whom?

A. To the public, to everybody that handles underwear.

Q. You would not say it was known to everybody, would you?

A. Well, to the customers and the sales people.

Q. Generally?

A. Generally.

Mr. CLARK. I think that is all.

Mr. MOLLOY. That is all.

HOWARD F. MYER was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Please state your present occupation.

A. Assistant buyer, men's furnishing department, Franklin Simon & Company.

Q. How long have you been in that capacity?

202 A. Five years.

Q. What was your experience in that general line of business prior to that?

A. I have been in the men's furnishing business about fifteen years.

Q. Part of that time as salesman?

A. As salesman and assistant buyer.

Q. About how many years as salesman?

A. I should say about eight or nine years.

Q. During that time you have handled various makes of men's underwear?

A. Yes.

Q. And you are familiar with the labels used by various manufacturers on their goods?

A. To a certain extent, yes.

Q. And among others you know that some manufacturers have put on their packages such labels as "natural merino" and "natural wool" and "gray wool" and "natural worsted?"

A. Yes.

Q. In your experience as salesman you came in contact with purchasers of underwear naturally?

A. Yes.

203 Q. And did you from your experience and observation form an opinion as to the general public's understanding of the term "natural merino" as applied to underwear?

A. To a certain extent, yes.

Q. What is your opinion of their understanding?

A. When I first went in the business "merino" was supposed to be a mixture of cotton and wool, in the trade. In reality "merino" should be a woolen garment.

Mr. MOLLOY. I object to that part of the answer as not responsive.

Mr. CLARK. Very well.

Mr. MOLLOY. I move to strike it out.

Examiner McKEAG. The motion will be recorded.

By Mr. CLARK:

Q. Please state your opinion as to what the public, as distinct from the trade, understand by the term "natural merino" when they see it on a manufacturer's box.

A. I do not quite understand your question.

Mr. MOLLOY. I object to this question on the ground that the subject has already been brought out by the two Government wit-



nesses who have already been on the stand, and that this answer could only tend to impeach the credibility of their testimony which is already on the record.

204 Mr. CLARK. I can only say in reply to that, that opinions may differ on that. I am not impeaching any particular witness. This witness may have his own impression.

Examiner McKEAG. He may answer subject to your objection.

Mr. MOLLOY. I just want to put it on the record.

A. The public that I come in contact with myself personally in selling goods, we always told them that merino was a mixture of cotton and wool.

Q. What was the occasion of your telling them that? I want to learn if I can what was their understanding before they got that information from you or from salesmen.

A. That I could not say.

Q. Have you known of any instances where customers in some way or other showed that they had bought mixed goods under such labels as "all wool?"

A. I never had any such cases.

Q. What do you yourself understand "merino" as a label on underwear indicates as to the percentage of cotton or wool?

A. How do I understand it?

Q. As to the percentage—that is, as to the proportions of  
205 the two, cotton and wool—does it mean anything in that respect?

A. I don't know.

Q. How low a percentage of wool have you known that term to be applied to in labels?

A. I could not tell you as to the percentage.

Q. Is there a wide range as to the proportion of wool and cotton labeled "merino"?

A. The way we were always told in the trade, the only way I can answer it is from my actual experience, that any mixture of cotton and wool was merino.

Q. Do you use the term "merino" or "natural merino" on the goods you sell?

A. No, sir; we do not use it.

Q. Why not?

A. For the simple reason that, as I stated before, it was brought to the attention of us some while ago; there was a dispute over that at one time. The contention was that merino—as I said we had always known it as a mixture for years, but this dispute was brought up, and we were forbidden to use the word "merino" because they claim that  
"merino" in the first analysis was an all-wool garment.  
206 and we do not use that term.

Q. You indicate that there was confusion in somebody's mind about the meaning of the term. In whose mind did you understand that confusion existed?

A. In the minds of the firm that I worked for.

Q. As to their understanding or as to the public's understanding?

A. Their understanding. They discontinued the use of it. We have not used the word "merino" in the last three years.

Q. You do not think the understanding of the public had anything to do with it?

A. Not to my knowledge. It might have.

Q. I thought you said there was no question as to the trade understanding that it was a mixed fabric?

A. That is the trade.

Q. Then, if there was no confusion in their minds why should they have wanted to clear up the ambiguity? Was not it an ambiguity in the mind of the public?

Mr. MOLLOY. I object to that. The witness has already testified that there was some question arose as to the proper use of this word, that it was put in question, and that the members of his firm ordered that it be discontinued.

207 Mr. CLARK. I am trying to find out.

Mr. MOLLOY. This proceeding is the occasion for it.

Examiner McKEAG. He stated that it had been discontinued for three years. That was before this proceeding was begun.

Mr. MOLLOY. He said about three years.

By Mr. CLARK:

Q. Do you make any distinction between the meaning of "natural merino" and "merino" on the label?

A. I can not say as to that, because I really have not had much experience with the word "merino" because we have not had anything to do with anything that has the word "merino" on it for years in our stock. That is, the only thing I can speak of is the things I come in contact with every day.

Q. Is your mixed underwear labeled "cotton and wool"?

A. It is not labeled at all.

Q. Can you name one of the members of your firm who was instrumental in discontinuing the use of the term "merino"?

A. I don't know as it was exactly the members of the firm. I believe it was the man whom I am assistant to.

Q. What is his name?

A. Mr. Williams.

Q. Is he still employed there?

208 A. He is. He is the buyer there.

Q. What is his first name?

A. Thomas Williams.

Q. As to the term "natural wool" from your observation and experience which you have had as salesman and buyer, what in your opinion is the understanding of the public of that term "natural wool" on a label on a manufacturer's box?

A. A garment stamped "natural wool"?

Q. Yes.

A. Why, it would naturally imply that it was a woolen garment of natural color.

Q. That it had no cotton in it?

A. No.

Q. And as to the term "gray wool"?

A. That I don't know.

Q. And "natural worsted"?

A. "Natural worsted" as I understand it is a mixture of cotton and wool.

Q. What is your opinion as to the public's understanding?

A. Well, that can be both ways. It is up really to the dealer. The dealer could tell the customer that natural worsted was all

209 wool, or that it was part cotton, whatever he wanted to.

Q. Suppose the dealer did not tell him anything about it?

A. I should say they would think it was all wool.

Q. And as to the term "Australian wool" what would that mean to the average purchaser?

A. That the wool came from Australia.

Q. And that there was no cotton in it?

A. No.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Myer, you say that your house discontinued the marking or exhibiting of this mark "merino" after there was some discussion as to the use of the word "merino" before the public. Is not that right?

A. Yes.

Q. Do you recall seeing in the press an announcement of proceedings brought by the Federal Trade Commission against the manufacturers of wool underwear, charging them with mislabeling and misbranding their products? Do you recall that?

A. I recall something of that; yes.

210 Q. Is it not a fact that the order came down from upstairs about the same time that you observed that in the daily press—about the same time?

A. I imagine so. I could not say positively.

Q. A little over two years ago?

A. I think it was around that time.

Q. And it was because of that notoriety that questioned the proper description of merchandise by the use of the word "merino" that your house, to avoid any possible misunderstanding, directed the discontinuance of the use of the word?

A. I believe that was the idea.

Q. But up to that time and at that time in your experience as a buyer and salesman it was generally understood by you and the public which you serve that "merino" was a term used to describe a fabric composed partly of wool and partly of cotton?

A. Yes.

Q. And during your experience of eight years as a salesman and some six or seven years as a buyer that meaning was generally ascribed to a fabric made up of wool and cotton?

A. Yes.

211 Q. Was any objection made by the purchasing public with whom you came in contact during your experience that it had been anything else?

A. I have never personally had any.

Q. In displaying merchandise which your house handles do you have any labels on your underwear products? Don't you sell them unlabeled?

A. I do not just understand you.

Q. I say, do you sell your underwear in your department with labels on it—in boxes with labels on it?

A. We do not use any stock boxes at all.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. Mr. Myer, you do not know of your own knowledge what did cause the abandonment of this term "merino" by Franklin Simon, do you?

A. No, sir; I do not.

Q. You were not consulted and did not have any part in that decision?

A. No, sir.

212 JOSEPH L. DALY was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Buyer.

Q. Where?

A. Rogers Peet Company.

Q. How long have you been employed in that capacity?

A. Twenty-three years.

Q. All that time as buyer?

A. Oh, no.

Q. In what capacity?

A. As a boy, and as salesman and assistant buyer and buyer.

Q. About how many years did you spend as a salesman?

A. Twelve years.

Q. And during that time you handled various lines of underwear, did you?

A. Oh, yes.

Q. And came in personal contact with the purchasers of underwear?

A. As a salesman; yes.

Q. With the purchasers of underwear?

213 A. Yes.

Q. And during that time you became familiar with some of the labels that manufacturers place on the packages of their goods, such as "merino" and "natural merino" and "natural wool" and "natural worsted" and "Australian wool"?

A. You use the term "natural merino." I never to my recollection can recall anything like "natural merino."

Q. But the others you have?

A. Marked "merino" and "natural wool."

Q. "Gray wool"?

A. "Gray wool." I can not recall "gray wool"; no.

Q. "Natural wool"?

A. "Natural wool"; yes.

Q. "Australian wool"?

A. Yes.

Q. From your experience and observation during your time as salesman are you able to give your opinion as to the understanding of the public generally, as distinguished from the trade, as to the meaning of the term "natural wool"?

A. Most people—that is, the consumers—understand that it is a woolen garment.

Q. Without cotton?

214 A. Yes, without cotton.

Q. And as to Australian wool, what do you think their understanding of that term is?

A. As an Australian wool—as wool coming from Australia.

Q. And as to "natural merino"?

A. I said I did not recall anything marked "natural merino."

Q. As to "merino"?

A. "Merino"—some people understand it as wool and cotton, and others do not.

Q. Others understand it as all wool?

A. As a wool; yes.

Q. And as to "gray wool"?

A. "Gray wool"—I said I was not familiar with it. I cannot recall that label.

Q. Do you use in your department the term "merino" as a label of underwear?

A. No. We receive goods from some manufacturers marked "merino," but we take those goods from those boxes and put them in our stock boxes, which have the label of Rogers Peet Company, by our own lot number and the size.

Q. That is, in selling that underwear to the public you do not present the labels such as "merino"?

215 A. No, we do not present it in those boxes in which it is shipped to us from the mills.

Q. How long has that been your practice?

A. Oh, as far back as I can remember. When I first came with them they had stock boxes. Now, of course, in some of the stores,

we do not use stock boxes, but we have cabinets, and the goods are put in the cabinets.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Has there been any doubt in your mind, Mr. Daly, as to the meaning of the word "merino" in the twenty odd years?

A. I take it that a "merino" is made from merino yarn.

Q. What is merino yarn?

A. It comes from the merino sheep.

Q. Do you want us to understand that the merino yarn you have been dealing in in the trade for some twenty years came from the merino sheep?

A. Perhaps I am so ignorant that I do not know, but that has been my understanding of it.

Q. Don't you know that merino yarn is a yarn made as a mixture of cotton and wool?

216 A. I never knew that to be so.

Q. You never knew that?

A. No.

Q. You have testified on the direct examination that you understood that a merino garment was a mixture, did you not—a mixture of cotton and wool?

A. I testified that some people understood that it was a mixture of cotton and wool.

Q. What was your understanding of it?

A. These goods that we get marked "merino?"

Q. "Natural merino."

A. I think I said I did not remember of goods being marked "natural merino."

Q. You have had experience with underwear marked as "merino" underwear?

A. Yes.

Q. Just how would that be described, to the best of your recollection?

A. "Men's merino shirts" or "Men's merino drawers?"

Q. Have you ever seen it described as "worsted merino shirts?"

A. No, I cannot recall that I have seen it described as worsted merino.

217 Q. Have you in the course of your employment purchased merchandise from the Winsted Hosiery Company?

A. I have purchased it from the American Knitting Mills Trading Company, which I believe sell their products.

Q. They are the selling agents for the Winsted Hosiery Company?

A. Yes.

Q. Have you not during your experience purchased from them their product marked "natural merino shirts"?

A. I can not recall that we have. We have purchased goods, but I do not recall ever purchasing anything marked in that way from them.

Q. In placing an order with the Winsted Hosiery Company for underwear through their selling agent, how would you purchase that as to the contents of the fabric?

A. He would submit samples and we would ask him whether it was all wool or not, and they would tell us whether it was all wool or not.

Q. And in making your purchases do you buy from them all-wool garments?

A. No.

Q. Do you sell any all-wool garments?

A. Yes.

218 Q. How are they marked? They are not marked, you say, but they are put in your stock boxes?

A. They are put in our stock boxes.

Q. When they are exhibited to the purchasing public, to your customers, how are they described to the purchaser?

A. The garments that are all wool?

Q. Yes.

A. As an all-wool garment.

Q. As an all-wool garment?

A. Yes.

Q. That is the word "all" is used to describe the character of the garment?

A. Yes.

Q. Garments that are partially composed of wool and partially of cotton, how are they described to the customer?

A. As a wool and cotton garment.

Q. Wool and cotton?

A. Yes.

Q. Have you ever described them as a "merino" garment?

A. No.

Q. Never have?

A. No.

219 Q. What reason have you to state, in your answer to the question, that some of the purchasing public do not understand what the word "merino" means? What was the occasion?

A. For the simple reason that they would ask you "What is this garment? Is it all wool"?

Q. Then why did you state as their opinion that part of your customers did not understand the word "merino" if they ask you specifically whether it contains part wool and part cotton?

A. Other customers have come in and asked me for "a merino garment, wool and cotton."

Q. And when they have asked you for a merino garment they have said "wool and cotton"?

A. Yes.

Q. So that as to them there could not be any deception or misleading, on their part?

A. No.

Q. Then what occasion have you for stating that part of the purchasing public misunderstand the use of the word "merino" as indicating a garment partially wool and partially cotton?

A. Did I say they misunderstood it?

220 Q. That is what I understood you. Of course, if you want to clear that up.

A. I should like to have the question and my answer read.

Q. I will put it this way: In your experience as a buyer and salesman have you had any occasion to believe that your customers, or the purchasing public generally, that you came into contact with, did not understand the meaning of the word "merino" as it applies to men's underwear, as meaning a fabric made partially of wool and partially of cotton?

A. Yes; because I have said that people will ask you, "What is this? Is it all wool?"

Q. What would be your answer?

A. I would tell them no; that it was wool and cotton.

Q. So the occasion of their asking you whether it was all wool was because you indicated that it was a merino garment?

A. No.

Q. Then how could there be any confusion in the minds of your customers as to the meaning of the word "merino"? If you did not describe the merchandise that you sell as "merino," how could there be any misunderstanding?

A. Take, for example, some particular salesman. Can they not figure that out as from merino wool?

221 Q. I am not asking you what somebody else can figure. I am just asking you your understanding of what the public impression is in dealing with your house, as one who has gained an experience through that number of years in your position. In other words, has there been any time that the public that you have served misunderstood the word "merino" as meaning all wool?

Mr. CLARK. I object to the form of the question as constantly implying that misunderstanding of the term consists in thinking that it means all wool. That is begging the question.

Mr. MOLLOY. Then I will substitute the word "understood" for "misunderstood." I will ask the stenographer to repeat the question with that word changed to "understood."

(The stenographer repeated the question as follows:)

"I am not asking you what somebody else can figure. I am just asking you your understanding of what the public impression is in dealing with your house, as one who has gained an experience through that number of years in your position. In other words, has there been any time that the public that you have served understood the word 'merino' as meaning all wool?"

222 A. The public that I serve—no.

Mr. MOLLOY. That is all.



Redirect examination by Mr. CLARK:

Q. Let us have it clear. I understood you to say in reply to my questions that your experience in dealing with the public, the purchasers of underwear, led you to the opinion that a considerable portion of them understood by the term "merino" an all-wool garment.

A. Yes; that is right.

Q. Is that correct?

A. Yes.

Q. And what is the basis of that conclusion?

A. Some people understand that merino—some consumers or customers who have come in ask for a merino garment, a wool and cotton garment. Other people come in and do not know whether that is a wool and cotton garment. Those goods are marked in the box in which they are shipped from the mill, "merino," "fine merino." Now, there are a great many people who know that there are merino yarns.

Q. And in your observation some of the people with whom you have dealt have that impression?

223 A. I believe so.

Q. I think that is all.

A. You will very frequently hear some of the men ask you "Well, what is merino?"

Recross-examination by Mr. MOLLOY:

Q. Can you not enlighten them?

A. Yes.

Q. What would you tell them?

A. If it is a wool and cotton garment we tell them that it is wool and cotton.

Q. It would not be anything else but a wool and cotton garment if it was marked "merino," would it, Mr. Daly?

A. If it was made from this merino yarn I do not see why it should be wool and cotton.

Q. Have you ever seen a garment made from a yarn of all merino wool?

A. Not underwear, no.

Q. In your twenty years experience did you ever hear of a product being offered to the trade generally as being made entirely of a yarn woven from merino sheep?

A. No.

224 Q. Your house buys pretty generally from the manufacturers of underwear throughout the country?

A. Well, when you say generally, I don't know just how to interpret that.

Q. You buy from manufacturers?

A. We confine ourselves—

Q. You would consider a garment made entirely from so-called merino wool as being a very high class garment, would you—a gar-

ment made entirely of yarn woven from a merino sheep as a very high class garment, would you?

A. I have never seen such a garment. I would have to see it first before I put my consideration on it.

Q. Then why did you state that you understood that a merino garment was a garment made from merino yarn which came entirely from merino sheep?

A. Simply because you use the term "merino."

Q. Do you know?

A. I have never yet been able to find a man to tell me why they called a wool and cotton garment "merino."

Q. When you are in doubt as to the meaning of any word, where would you go to throw light on it?

A. The dictionary.

Q. And if you went to a dictionary—you have heard of  
225 Webster's Dictionary?

A. Yes.

Q. If you turn to the word "merino" in Webster's Dictionary—  
Mr. CLARK. I object—

Mr. MOLLOY. Just wait a minute now.

Mr. CLARK. No, no; I object. I object to any statement of what Webster says, as helping this witness's understanding of the term.

Mr. MOLLOY. We are on cross-examination. The witness has attempted to give a meaning to a word. The origin of his understanding of that meaning he admits he does not know, and I want to cross-examine him, not to exhibit his ignorance, because we are all subject to the same charge, but to lay on the record the fact that he has not gone to the one authoritative means of enlightening himself as to a meaning that he is in doubt about.

Mr. CLARK. You can ask him if he has looked in the dictionary, but I object to your reading the dictionary definition. I object to the introduction of it here in the form of a question.

Examiner McKEAG. He may cross-examine him as to his knowledge of Webster's definition.

226 Mr. CLARK. Whether or not he knows.

Examiner McKEAG. Yes.

By Mr. MOLLOY:

Q. Do you know the meaning of the word "merino" as it is defined in the common dictionaries of the English language in general use?

A. I have never looked for it in the dictionary.

Q. What do you understand to be the meaning of "lisle half hose"?

A. Made of cotton.

Mr. CLARK. I object to that as having no pertinency.

Examiner McKEAG. To what is this directed?

Mr. MOLLOY. Just to the witness's attempt to give a meaning to a word. I want to cross-examine him as to the extent of his knowledge of words generally used in the English language.

Examiner McKEAG. You may do that.

By Mr. MOLLOY:

Q. What would you understand is meant by the words "Sheffield plate"?

A. I do not know anything about Sheffield plate.

Q. The words are in common use.

227 A. I see them in the advertisements, etc. I do not know what it means, though.

Q. What would you understand the word "roan horse" to mean?

A. A color of a horse.

Mr. MOLLOY. That is all.

JAMES J. LEARY was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Buyer for Brokaw Brothers.

Q. How long have you been employed in that business?

A. Twenty years.

Q. Have you had prior to that experience as a salesman?

A. Yes.

Q. For about how many years?

A. Seven or eight.

Q. As salesman and buyer you have handled men's underwear?

A. Yes.

Q. And you have become familiar in your experience with some of the labels used by manufacturers on their shipments of underwear, such as "natural merino" and "natural wool" and

228 "gray wool" and "Australian wool"?

A. Yes.

Q. In your experience as salesman you of course came into personal contact with many of Brokaw Brothers' customers?

A. Yes.

Q. By the way, were you a salesman in Brokaw Brothers?

A. Yes.

Q. And you were a salesman of underwear among other things?

A. Yes; I handled underwear.

Q. And you have formed an opinion as to the general understanding of the public as to some of these terms which I have named?

A. Yes; I have. I do not—

Q. What is your opinion as to the understanding of the average purchaser of underwear of the term "natural merino," as to whether it is all wool or cotton and wool?

A. Why, I don't think the buying public know the difference. They depend on the organization that is selling them, whether we sell them cotton or wool or part cotton and part wool.

Q. So as far as the label goes the public does not know whether it is all wool or whether it is a mixture?

A. No; they do not.

229 Q. Some of them, you think, have the impression that it means all wool?

Mr. MOLLOY. I object to that. He says that they do not know. Now you are putting an answer into the witness's mouth. He has already answered that, Mr. Clark.

Examiner McKEAG. Frame your question differently.

By Mr. CLARK:

Q. In your opinion do some of the purchasing public understand by the term "natural merino" an all-wool garment?

A. No.

Q. You said that they were uncertain in their minds—uncertain as to what? I understood you to say that the impression they got from such a label was an uncertainty as to whether it was all wool or whether it was wool and cotton.

A. Yes.

Mr. MOLLOY. The witness did not say that. I object to putting words in his mouth. He said he did not think they know the difference.

Examiner McKEAG. I think the witness has stated that the name "natural merino" meant nothing to the public, either all wool or wool and cotton.

Mr. MOLLOY. Exactly.

230 Examiner McKEAG. I think Mr. Clark's question was along the same line.

Mr. MOLLOY. No it was not. I will ask the stenographer to go back and read the last half dozen questions or so.

(The stenographer read as follows:)

"Q. What is your opinion as to the understanding of the average purchaser of underwear of the term 'natural merino' as to whether it is all wool, or cotton and wool?

"A. Why, I don't think the buying public know the difference. They depend on the organization that is selling them, whether we sell them cotton or wool, or part cotton and part wool.

"Q. So far as the label goes the public does not know whether it is all wool, or whether it is a mixture?

"A. No, they do not.

"Q. Some of them you think have the impression that it means all wool?

"Mr. MOLLOY. I object to that. He says that they do not know. Now you are putting an answer into the witness's mouth. He has already answered that, Mr. Clark.

"Examiner McKEAG. Frame your question differently.

"By Mr. CLARK:

"Q. In your opinion do some of the purchasing public understand by the term 'natural merino' an all-wool garment?

"A. No.

231 "Q. You said that they were uncertain in their minds—uncertain as to what? I understood you to say that the impression they got from such a label was an uncertainty as to whether it was all wool or whether it was wool and cotton.

"A. Yes."

Mr. CLARK. I submit that is a proper pursuit of the main question.

By Mr. CLARK:

Q. As to the term "natural wool," what should you say was the understanding of the public as to that, when they saw it on a label, as to whether the garment so labeled was all wool or cotton and wool?

A. When a man says to the clerk, "I want all wool," the clerk knows by the number of the garment whether it is all wool, or silk and wool, or cotton and wool.

Q. My question is a very narrow one—simply as to whether in your experience as a salesman you got an impression as to what the average purchasing public, men or women, understood when they saw the label on goods "natural wool," irrespective of any correction of any wrong impression that they might get from the salesman. I want to get at what meaning that label bore to their minds when they saw such a label.

232 Mr. MOLLOY. I think you are building a question on premises that do not exist. My understanding of Brokaw Brothers is that they merchandise in their own boxes, and not the boxes having the manufacturer's label.

A. We do not have any boxes. We never display boxes at all.

By Mr. CLARK:

Q. I am not asking about Brokaw Brothers in particular.

A. That is all I know. I have been brought up there and I know nothing else.

Q. I know, but I suppose you have had from the public more or less expressions as to what different descriptions of underwear mean.

A. We have had for thirty years American hosiery underwear from there, stamped "Merino," and it was only the last two or three years that I knew what the label "Merino" meant. But in selling that garment a man will say "How much wool is there in this?" "About 50 per cent." It is stamped "Merino." That is No. 1742. Then we know that another garment a little heavier was also stamped "Merino." And that was a little more wool.

Q. That was your knowledge?

A. That was my knowledge.

233 Q. As a salesman.

A. Yes.

Q. Now, I am asking you what, in your opinion, if you have an opinion, was the understanding of the public as to the goods labeled "Merino" as to whether they were mixed or whether they were wool?

A. I never knew personally of any opinion of the public about the word "Merino."

Q. Then you can not say?

A. No.

Q. Or as to the term "Natural wool"?

A. That does not mean anything, because our underwear has always been shown in cabinets or on shelves out of boxes, and the only place where the article would be marked "Natural" would be the box. The garment itself would not be.

Q. Have you ever had occasion to correct an impression of a purchaser of a garment labeled "Merino" or "Natural wool"—his impression that it was all wool, by stating that it was a mixture?

A. No.

Q. What, in your opinion, is the average purchaser's understanding of the term "Australian wool" on underwear?

234 A. Why Australian wool—

Q. As applied to underwear.

A. The only garment that we ever had that was stamped "Australian wool" was a garment made by an old concern in Norfolk, New Brunswick, but they have been out of business for several years. It was stamped "Australian wool" and it was Australian wool. Since then I have not seen garments so stamped.

Q. Then what would you say was the public's understanding as to the term "Australian wool" when they saw it?

A. Nothing. I don't believe they had any opinion.

Q. That means that they did not know whether it was wool, or wool and cotton?

A. Yes; they knew it was wool, but they did not know whether it was made in Australia, or whether it was made in Austria, or whether it grew in Scotland, or where it grew.

Q. But as between cotton and wool, and wool, they understood what?

A. That it was a woolen garment.

Q. That is, made of wool entirely?

A. That it was made of wool, yes.

Q. Have you any impression as to what they understood by the term "natural wool"?

235 A. No; that only represented color. Australian wool was in white, and the "natural" was the gray.

Q. As to whether it indicated all wool as distinguished from wool and cotton, are you able to express an opinion as to the public's understanding of that?

A. No; I can not. They looked at the white, and they would say "have you got that in gray," and "how much wool is in it"? We would say "it is all wool" or "three-quarters wool" or whatever it is.

Q. Do you handle any all-wool underwear?

A. Yes; it is made in Europe.

Q. Do you know how that is labeled when it comes to you?

A. We have a French garment that is marked "all wool." If I can recall it rightly, it is called "Demophile." Then we have another called "Two Steeples" made in England.

Q. Is there any label on that, whether wool or not?

A. I think it is marked "all wool," but I would not be positive right now.

Q. Do you know of any imported all-wool garments that are marked "merino"?

A. No.

Q. Have you ever had charge of sales people?

A. Oh, yes.

236 Q. In the underwear department?

A. Yes.

Q. Have you observed any use of such labels in the hands of sales people to encourage the idea of the purchasers that the goods so labeled were all wool?

A. I think it would be a good thing if they were marked with the construction, whether they were part or all wool.

Mr. MOLLOY. I want to lodge an objection on the record to that.

Examiner McKEAG. That answer may be stricken out. Read the question.

(The question was read as follows:)

"Have you observed any use of such labels in the hands of sales people to encourage the idea of the purchasers that the goods so labeled were all wool?"

A. No; I have not.

By Examiner McKEAG:

Q. Has it been necessary to instruct salesmen as to the contents of merino garments?

A. No; they know. The only one we have had, as I said before, was the American hosiery, and those have been stamped with two numbers, 1742 and 1726.

237 Q. When you get a new salesman in the store, do you have to explain to him what those garments are?

A. They are supposed to know. When we hire men we are supposed to hire ones who have had experience. Beyond that the underwear man puts them through on the different numbers, tells them the construction, and so on.

Q. As to the contents of the garment?

A. As to the contents of the garment.

By Mr. CLARK:

Q. Have you ever instructed them that "merino" means wool and cotton?

A. No; I know what merino is. I have never been instructed, but I knew those garments marked "merino" were not merino.

Q. That is, that they were not merino wool?

A. I don't know whether merino wool, but that they were part wool and part cotton. Whether they were merino wool I don't know.

Q. I understood you to say that salesmen, when they were employed, were instructed as to the meaning of labels.

A. No; I did not say that. We do not go by the label. We go by the garment.

Q. A private mark?

238 A. No; the construction; what it is. We just say "Tell them this is about 60 per cent wool, and this one here is all wool, this is part wool, and this is cotton and wool, this is silk and wool."

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. As I understand your testimony, Mr. Leary, you have stated that your knowledge of merino is a garment consisting partly of wool and partly of cotton. Is that a correct understanding of your answer?

A. No.

Q. Just tell us.

A. Merino is a sheep, if I remember right.

Q. Well, it depends on what use you put it to. I am talking now of merino underwear. In your twenty years' experience you have come in contact with people in selling and also in buying. In that twenty years' experience what have you understood "merino" underwear to mean?

A. It meant nothing.

Q. You say you have been buying for some years merino underwear with two numbers, that have been marked "merino" by the American Hosiery Company?

239 A. Yes.

Q. And when you obtained from them these two numbers that you have described, marked "Merino," did you not know what you were buying?

A. No; I inherited those numbers. They have used them in Brokaw's for fifty-odd years.

Q. In instructing your salesmen in offering these two numbers, what instructions were given to the salesmen in offering them to the purchasing public?

A. That they were part wool.

Q. And part cotton?

A. And part cotton.

Q. In order to give them that information you must have obtained it from some source.

A. Yes; but from boyhood we got them.

Q. So you did have knowledge, and a knowledge going back, say, some twenty-odd years, that merchandise marked "Merino underwear" was part cotton and part wool?

A. Yes.

Q. Did you ever hear it described generally in the trade as anything different than a fabric made of part wool and part cotton?



A. I have never had it brought up to me, to have it described.  
 240 Q. You have known it to mean a garment made partly of wool and partly of cotton in your use of it?

A. The only occasion I have had was several months ago, when the American Hosiery Company wrote a letter, a general letter, to the retailers, asking if the public objected to the label, and if I objected to it, marked "Merino"? They asked me to answer one way or the other, yes or no, and I just filed it and never have answered it.

Q. In merchandising your stock, in selling it, in offering it to the public, you take the garments out of the original packages and put them in your own racks, do you not?

A. Yes.

Q. So that the labeling and branding of merchandise by the manufacturer bears no part of the selling of merchandise in your shop?

A. If it is on the garment it does, but not on the box.

Q. Do any manufacturers mark their fabric on the garment itself?

A. Yes.

Q. I mean as to its contents?

A. Yes. Outside of "all wool" I don't know of any. They do not say "part cotton and part wool." I have had such garments  
 241 marked "All wool."

Q. But generally the marking on the garment is the trade name of the manufacturer?

A. Yes.

Q. Not a description of the contents of the garment?

A. No.

Q. Except that you have stated that you have seen an "All-wool" stamp marked on the garment itself?

A. Yes.

Q. In your contact with the customers generally have you ever heard any objection raised or doubt expressed by the customers as to the meaning of the word "merino"?

A. No; I never have.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. You refer to a letter from the American Hosiery Company asking you to express an opinion as to whether there was any objection to the term "merino"?

A. Yes; they said the Government was after them to change their label, and they wanted to know if I thought that the public in  
 242 general objected to the word "merino" on the garments.

Q. Why didn't you answer that letter, may I ask you?

Mr. MOLLOY. I object to that.

Mr. CLARK. No. Let us see what his reasons are.

Mr. MOLLOY. We are not involved in whether or not he has answered the letter of the American Hosiery Company, or answered a question that they put to him. We are attempting to try the issues involved between the Federal Trade Commission and the Winsted

Hosiery Company, and the evidence must be limited to the issues in this case.

Mr. CLARK. No; we are trying to find out the understanding of this witness as to this term "Merino."

A. It was general, I should imagine, because it was a circular letter.

Q. I wondered if it was because you could not express an opinion.

A. Oh, yes; I did not think it was necessary that I should go on record; that was all.

Q. Do you think there is any objection to the use of the term?

Mr. MOLLOY. I object to calling upon this witness for an expression of opinion as to a question asked him by competitors of these manufacturers.

Mr. CLARK. He was entitled to express an opinion as to the meaning of the term "Merino." Now, whether or not he has an objection to it goes to the very root of the matter. If he has an objection, it probably is founded on the misuse of the term, its susceptibility to mislead the public.

Mr. MOLLOY. There is no evidence that it is susceptible of misleading the public.

Examiner McKEAG. He may answer the question, subject to counsel's objection.

Mr. MOLLOY. I except.

A. What was the question.

Q. Do you think there is any objection to the use of the term?

A. Why, no; I do not. If you could have some way to show the percentage of wool and cotton—

Mr. MOLLOY. I object to that. He is adding his personal opinion. It should be stricken from the record as not responsive to the question.

Examiner McKEAG. He may complete his answer subject to your objection.

A. If there could be some way to state the percentage of wool and cotton in the garment, whether it be hosiery or underwear, I think it would be a good thing for the education of the clerk as well as the customer.

Q. Do you think it would be an equally good thing to mark the mixed goods, whether they are wool and cotton?

A. Yes.

Mr. MOLLOY. I object to that on the same ground.

Examiner McKEAG. The objection will be noted.

Q. Why? Why would it be a good thing?

A. It would help the customer to know what he was buying from houses that are not as reputable as Brokaw's, and it would help the salesman who is selling it.

Q. What use do the houses which you refer to as not as reputable as Brokaw's make of these labels which it would be an advantage to present?

Mr. MOLLOY. I object to that as presupposing in the mind of the witness a knowledge of the uses that the other houses put it to.

Examiner McKEAG. If he has any knowledge he may so state.

A. Why, I have no personal knowledge outside of a lot of these—

Mr. MOLLOY. Then I object.

245 Examiner McKEAG. He has not finished his answer. Let him finish it.

A. A lot of these, what they call schlag shops, of which we have one next door to us, that I had occasion Saturday—they had been selling Arrow Brand collars for \$1.29 a dozen. I called up the manufacturer and told him about their collars being sold for \$1.29, the windows plastered up with signs that Arrow Brand collars were being sold for \$1.29 a dozen. They cost \$2.10 a dozen. So he said he would have a stop put to it. The next day I saw his wagon backed up to the same place delivering collars. I called up Cluett, Peabody & Company and asked what they meant by it. They said they were selling seconds to them, and that their names were torn out of the collars, both the name of the collar and the maker. And yet this man had a sign placed all over the window "Arrow Brand collars, \$1.29 a dozen," just to get customers in to buy something else. When you go there they have two styles, and they allow the public to believe they have a full stock, from the way their windows are advertising Arrow Brand collars.

Mr. MOLLOY. I move to strike out the answer of the witness except the categorical answer yes or no, upon the ground that it is  
246 not responsive, and is outside of the issues in this case. We are not concerned here with a specific fraud or deception practiced by some retailer in handling some other brand of goods other than complained of in this proceeding. I move that the answer be stricken out to that extent.

Examiner McKEAG. The motion will be reserved for ruling by the commission.

By Mr. CLARK :

Q. What is the relation between your recent experience in relation to the Arrow collars and your statement that the marking of woolen and cotton goods as wool and cotton would be a good measure?

Mr. MOLLOY. I object also to the question on the ground that it is not proper redirect examination.

Examiner McKEAG. I really think, Mr. Clark, that line of examination has probably gone far enough.

Mr. CLARK. I regard it as very important that he state the significance in his mind of his experience with the Cluett collar. In connection with his statement that he believes it would be a good thing if goods made of wool and cotton could be so marked, he has stated  
247 that in the case of collars there has been an imposition of second-hand goods on the public. I want him to state that.

Examiner McKEAG. He may answer subject to counsel's objection.

A. If they just put a statement in the window, "Collars, \$1.29 a dozen," they would not sell.

Q. What is the relation of the collar matter to the matter of labeling cotton and woolen goods as cotton and wool?

A. If they put a sign in the same window that they were selling a pure wool underwear garment for \$1.50 when it is impossible to manufacture it for that, it would be misleading, and if that garment was not marked, why, they could put it over on the customer.

Q. How about the terms in question here, such as "Merino"?

A. They do not mean anything.

Q. "Natural wool," does that mean anything?

A. No.

Q. In the way of misrepresentation, that the goods are made of cotton and wool?

A. No.

Mr. CLARK. All right. That is sufficient.

Recross-examination by Mr. MOLLOY:

Q. In other words, to draw the parallel as you have, Mr. Leary, it would be a direct fraud and deception if they should put into the window an article marked "all wool" when it was not?

A. Yes.

Q. But if the garment was marked "Merino" the person going in to buy it would have every reason to believe that the product was a composition of wool and cotton?

A. The word "Merino" might be the maker's name to the majority of customers.

Q. But there would be no fraud or deception experienced by the buyer in going in, if it did not contain 100 per cent wool?

A. No.

Redirect examination by Mr. CLARK:

Q. Then what was your reason for saying that you think that merino goods composed of wool and cotton as you say it is understood by the trade—what is the object in marking them specifically "cotton and wool"?

A. No objection.

Q. I understood you to say that it would be a good thing.

A. I thought you said what was my objection, if they did mark it cotton and wool.

Q. But what would be the object in marking them specifically cotton and wool, if that did not mislead?

A. As I said before, I do not think the public knows any more about merino than some of these chairs.

Q. Do you mean by that that they may believe, some of them, that it means all wool?

A. No.

By Examiner McKEAG:

Q. If then a retailer told a customer that the "merino" was all wool, they might believe it?

A. Yes; they would.

Mr. CLARK. That is all.

Recross-examination by Mr. MOLLOY:

Q. And if the salesman told him an article composed of Australian wool was all wool, the purchaser would believe it?

A. I think he would.

Q. In other words, what they would believe would be the fraud practiced by the salesman on the customer?

A. It depends on the organization that employed the salesman, and the house the man buys the goods from.

Q. And in a house that has no reputation to maintain the  
250 salesman might misrepresent his goods?

A. To make a sale.

Q. And the public purchasing from them will be misled and deceived by them?

A. Absolutely.

Q. And the fraud and deception resulting from it is due to the practice of the salesman in representing something that is not?

A. Absolutely.

Redirect examination by Mr. CLARK:

Q. These terms which include the word wool, such as "natural wool" or "gray wool" and "merino" which you say primarily comes from the sheep—those terms you think may be used, don't you, by unscrupulous people to convey the idea that they are all wool?

A. Yes.

Q. So you would have them marked "Cotton and wool?"

A. Yes.

Q. So there would be no deception?

A. I think it would be better, if you were going to mark  
251 them at all, it would be just as easy to mark "70 and 30," or "60 and 40."

Recross-examination by Mr. MOLLOY:

Q. Are you familiar with the clothing department?

A. Just enough to know a little about it. I do not have anything to do with it now.

Q. Do you know whether or not a worsted suit, that is sold as a worsted suit, does or does not contain 100 per cent wool?

A. Why, yes. I know that it does contain 100 per cent wool.

Q. It does not?

A. It does. Everything that we sell is 100 per cent.

Q. 100 per cent wool?

A. In seventy years we have never had anything in clothing that did not represent 100 per cent, by expert tests which they employ there.

Q. Who are the manufacturers from whom you buy your clothing?  
Do you know?

A. Nobody. We manufacture our own.

Q. From whom do you purchase your cloth?

A. From the best English houses and American houses.

Q. Name some of the American houses.

A. I do not know why it is necessary to name them.

252 Q. You have made a statement, and I want to get the information to make the basis for perhaps a little light thrown on the answer you have given, Mr. Leary.

A. Is it necessary that I should tell the concerns that Brokaw Brothers buy their goods from?

By Examiner McKEAG:

Q. Is there any secret about it?

A. No; but I don't know why I should. Well, I know one is the American Woolen Company, and Mabitt is another.

Redirect examination by Mr. CLARK:

Q. So when the term "worsted" is applied to clothing by your house at least it means all wool, does it?

A. "Worsted" means all wool; yes.

Q. Why doesn't it mean the same thing as applied to underwear?  
Can you tell?

A. No, I can not.

Q. But you think it does not convey that meaning to the public?

A. No; I don't think it does, to the public.

(Whereupon, at 4.45 p. m., on the 15th day of November, 1920, the above hearing was adjourned until November 16, 1920, at 2 p. m.)

253 NEW YORK, N. Y., November 16, 1920.—2 p. m.

Met pursuant to adjournment.

Appearances: Same as yesterday.

SOLOMON WRIGHT, Jr., was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Will you state your business?

A. President of the corporation of the Wright Underwear Company, manufacturers of knit underwear at Troy and Cohoes, New York.

Q. Is their office in New York City?

A. Yes.

Q. How long have you been connected with the firm?

A. With the corporation since its inception in 1894, and before that proprietor.

Q. What class of goods do you manufacture?

A. Cotton, cotton and wool, and all wool.

Q. That is three classes of underwear, as I understand?

A. Yes.

Q. Cotton, cotton and wool, and all wool?

A. Yes.

254 Q. Will you state approximately the average annual output in dollars of your factories?

A. I should have to estimate that. Without referring to the books I should say very close to \$3,000,000.

Q. And of that output about what proportion is represented by the all-wool product?

A. About 33 to 35 per cent.

Q. So that the all-wool output would represent about a third of the value or a little more?

A. A trifle more. I think it would be just about half, \$1,000,000 or \$1,200,000, perhaps.

Q. That would be nearer a third, would it not? I do not know that I understood the proportion. Let me ask you again, what do you say is the proportion in value of your whole output, of the all-wool product?

A. In value it would be very close to half—about \$1,500,000.

Q. As to the output of mixed wool and cotton garments, how does your company label the mixed goods?

A. We use no descriptive label. Ours are all indicated by style numbers.

Q. How do you label the all-wool output?

A. We label each garment with a woven label with the words  
255 "All wool."

Q. And do you label the cotton product in any way?

A. Simply with our trade-mark, or Wright's Spring Needle underwear.

Q. Are you acquainted with other manufacturers in this country who make all-wool underwear?

A. I know of them, but I am not acquainted with them.

Q. Can you name some of them whom you know make all-wool underwear?

A. The Collins Manufacturing Company of Pittsfield, I believe, is one manufacturer.

Q. Collins underwear, is it?

A. I believe that is it. I know it as Collins underwear.

Q. Of Pittsfield?

A. Yes.

Q. Do you know the amount of their output as compared to your own?

A. No.

Q. Can you name some one besides Collins who makes all-wool underwear?

A. I really know this by hearsay, and seeing the garments, and have never analyzed any.

256 Q. Assuming that they are what they purport to be.

A. The Root Manufacturing Company. Do you mean at the present time, that are manufacturing these all-wool goods at the present time?

Q. Well, no; particularly those who did three years ago.

A. I think the number was very limited then.

Q. Did Collins?

A. Yes; I think so.

Q. And Root?

A. I understand they have made those goods for a number of years.

Q. Reis?

A. They were not manufacturers then. I never knew that they made any. There is Jaeger, but they are imported.

Q. Is not there a firm in Philadelphia by the name of Hanifen?

A. Yes.

Q. Did they make all-wool garments to your knowledge as long as three years ago?

A. I could not say.

Q. You do not recall at present any other manufacturer of all-wool garments who you know was producing them three

257 years ago?

A. No, sir.

Q. Can you add to these any whom you know have manufactured all-wool garments within the last three years?

Mr. MOLLOY. I object to that question as bringing it down to a period subsequent to the issues involved in this case.

Mr. CLARK. I shall be glad to have the name, to verify it, regardless of when they manufactured.

Mr. MOLLOY. You have asked that, and the witness has told you that he is unable to state.

Q. Have you some knowledge of importers' all-wool underwear?

A. No, sir.

Q. Do you know it to be a fact or not a fact that all-wool garments are imported?

A. I know it by hearsay.

Q. In the purchases of wool for your various products do you distinguish merino wool as a particular grade or quality of wool?

A. Yes.

Q. And what is the distinctive character or quality of that wool as known to you as a purchaser of wool?

258 A. Fine quality.

Q. In what respect, if you can analyze it a little, the size of the fiber or the length?

A. The size of the fiber, the fineness of the fiber. It would mostly apply to Australian wools.

Q. Does it include wool from the merino stock of sheep?

Mr. MOLLOY. I object to that as a leading question. Ask the witness if he knows from what stock of sheep it comes.



Examiner McKEAG. See if you can frame your question in that way.

By Mr. CLARK:

Q. You say it comes mostly from Australian wool. From what other class of fleece does it come, as far as you know?

A. Well, I don't know, because we principally use Australian wool in the manufacture of our all-wool goods.

Q. Is there a merino wool as distinguished from Australian wool in the wool market? Do you know?

A. I don't know as I understand the question.

Q. Is the term "merino" known in the wool market as distinguishing a grade or quality of wool different from Australian wool?

A. That I could not say.

Q. Are you familiar with the term "worsted"?

259 A. Yes.

Q. As applied to underwear will you state what you understand "worsted" to mean.

A. It means made from wool having the fibres combed so that they lie more horizontally, spun into different sizes, meaning a yarn with an exceptionally long staple wool or long fibre wool.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Wright, do you know what is known generally in the industry as a merino worsted yarn?

A. Yes.

Q. Tell us what you understand that to mean.

A. A percentage of cotton and wool.

Q. That is a yarn made by a mixing of cotton and wool?

A. Yes.

Q. Have you in the years of your experience in the industry been acquainted with an article on the market known as merino wool, as indicating wool from a particular animal, or merely as a grade or quality of wool?

A. Simply as a grade and quality both of wool.

260 Q. In the product that you manufacture and sell in the market in which wool and cotton are used as a mixture for your finished product, is it not a fact that the percentages of wool and cotton in the garment vary?

A. Yes.

Q. In other words, you make a garment in varying percentages of wool and cotton, to meet the varying demands of the trade which your product serves?

A. Yes.

Q. As I understand you in answer to the counsel's question, in marking your garments made of all wool, that fact is so stamped on the garment or on the box containing the garment, as all wool?

A. Only on the garments.

Q. Is there any mark on the brand or label that you use in marketing your product composed partially of wool and partially of cotton indicating the fact that it is a mixture of wool and cotton?

A. No, sir.

Q. In those garments that are made and sold generally in the trade that you come in contact with, where all wool is used in the garment, is it not a fact that they are usually branded or labeled as being an all-wool garment?

Mr. CLARK. I suggest that you ask him first if he knows.

261

By Mr. MOLLOY:

Q. If you do not know you can so state.

A. I am trying to recall whether I have seen any of those.

Q. You are familiar with Dr. Jaeger's product?

A. Yes.

Q. Is it not a fact that he features very prominently the fact that it is an all-wool garment?

A. Yes.

Q. You have also testified as to the Collins product. Is it not a fact that they very extensively advertise their product that it is an all-wool garment, or feature it on their product?

A. I do not think they advertise.

Q. They feature it on their product, or by brand or label, the fact that it is an all-wool garment?

A. I do not think I have ever seen it on the garment.

Q. You have stated that the percentage in turnover of your plant of the all-wool garments as compared to the other product of your mills is about 50 per cent. You mean that in value, do you not?

A. In value, approximately.

Q. The percentage in garments would bear what relation to the whole?

262 A. Roughly about 33 $\frac{1}{3}$  per cent, I should say, approximately.

Q. In marketing your product is it not a fact that you do so under your trade names or brands?

A. Yes.

Q. And descriptive labels have never played a part in the merchandising of your products?

A. No, sir.

Q. Or, in other words it is merely what we call a trade-mark product, that is the product of your mill is a trade-mark product and advertised as such?

A. Yes.

Q. Do you know what is generally understood to be meant in the trade as a merino underwear garment?

A. Yes.

Q. Tell us what you understand that to mean.

A. A composition of cotton and wool.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK :

Q. When you state your meaning of that term you speak as a manufacturer, do you not?

263 A. Yes.

Q. The statement you have made as to your manufacture of all-wool garments and the way you brand them applies to the period three years back?

A. Yes.

Q. And on your mixed wool and cotton product you do not use the term "merino," do you?

A. No, sir.

Q. In your mixed cotton and wool product what percentage of cotton and wool are present? If the percentage varies, state the range.

A. From 28 per cent to 77 per cent.

Q. Of wool?

A. Of wool, yes.

Recross-examination by Mr. MOLLOY :

Q. When you say that during your connection with the industry, that includes from 1894 down to and including the present time?

A. Yes.

264 Q. During that period what have been your activities in the industry—solely that of a manufacturer, or of a distributor as well?

A. Both.

Q. As a distributor did you come in contact with the purchasing trade throughout the country?

A. Yes.

Q. And can you tell us whether the word "merino" from your experience in the trade in coming in contact with them in that manner has always understood the word "merino" as it applies to underwear to mean a garment partially composed of cotton and partially composed of wool?

A. Yes.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK :

Q. During this time you have been making all-wool garments, you have had a number of competitors in that line in this country?

A. Yes.

WILLIAM ROWAN was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK :

265 Q. Please state your business at the present?

A. Buyer of underwear, silks and dress goods.

Q. For what house?

A. John Daniels & Sons.

Q. Where are they located?

A. Broadway and 8th street.

Q. Are you at present buyer there?

A. Yes.

Q. In the underwear department?

A. Yes.

Q. How long have you been in that capacity?

A. Only a period of two and a half years as buyer of underwear.

Q. Before that where were you employed?

A. In the same house.

Q. Will you state fully your experience.

A. As a buyer of silks and dress goods.

Q. For how many years were you in that capacity?

A. Fifteen years.

Q. Have you also been employed anywhere as a salesman?

A. Only in the same house previous to that, in this country, I mean.

Q. And as a salesman?

A. With the same house.

Q. Did you handle underwear?

A. No.

Q. As buyer have you supervision of the salesmen?

A. I have, yes.

Q. In the underwear department?

A. Yes.

Q. And you have come at times in contact yourself with the purchasers?

A. Yes, frequently.

Q. You have purchased underwear for Daniels & Sons from a variety of manufacturers of underwear?

A. We do, yes.

Q. Have you purchased any all wool underwear?

A. I could not say that we do, no. I do not believe we do.

Q. You have become familiar with the terms used by different manufacturers and their labels on the boxes in which they deliver to their customers the underwear which they manufacture?

A. Yes.

Q. Do you know whether such terms are in use as "merino" and "wool" and "natural wool" and "natural worsted"?

A. Yes.

Q. Will you state your own understanding of the term "merino" as applied to underwear?

A. "Merino" as I understand the term is an all wool fabric.

Q. Of any particular quality?

A. The very finest, yes.

Q. And from any particular breed of sheep?

A. From the merino sheep, yes.

Q. And the term "natural wool"; how do you understand that term?

A. As a high class woolen garment only.

Q. And "natural worsted"?

A. Also wool.

Q. Have you had occasion to learn from your relations with your sales people and with customers the public's understanding of those terms?

Mr. MOLLOY. I object to that. The witness has testified that he has had only two and a half years' experience in the underwear department—no previous experience.

Examiner McKEAG. He can qualify as a salesman, but he has not indicated that he came in contact with the public at all.

268 Mr. CLARK. I asked him if he had, and he said he had.

Mr. MOLLOY. And his testimony has shown that that has been limited to the last two and a half years.

Mr. CLARK. I submit that two and a half years is quite sufficient.

Mr. MOLLOY. One moment. Two and a half years ago is a date subsequent to the bringing of this proceeding, and therefore outside of the issues of this case.

Mr. CLARK. I think the examiner will take notice that the use of these terms has not changed within the last three or four or five years at least.

Mr. MOLLOY. That is not so, because the testimony is already in the record showing that as the result of these proceedings they have changed.

Examiner McKEAG. The record made so far will show the experience of the witness and the basis for his testimony. He may answer the question subject to Mr. Molloy's objection.

Mr. CLARK. I call the attention of the examiner to the fact that the witness has said that in his capacity as salesman he did come in contact with the sales people and with the customers.

269 Examiner McKEAG. The record will show what his testimony has been. He may answer subject to counsel's objection.

Mr. CLARK. I ask that the question be repeated.

(The stenographer read the question as follows:)

"Q. Have you had occasion to learn from your relations with your sales people and with customers the public's understanding of those terms?"

By Examiner McKEAG:

Q. Answer yes or no.

A. Yes.

By Mr. CLARK:

Q. And what do you understand to be the understanding of the public of the term "merino"?

A. A mixture of cotton and wool.

Q. And of the term "natural wool"?

A. That would be an all-wool garment.

Q. And the term "natural worsted"?

A. Also an all-wool garment.

Q. Will you state any particular instances if there have been such on which you base your statement as to the public's understanding of those terms?

Mr. MOLLOY. One moment. The question sounds like cross-examination to me. I object to it on the ground that the counsel has already laid the basis for qualification of the witness's expert testimony, and has asked him a general question as to his understanding of the purchasing public's knowledge of that word. He has given him an answer. Now it seems to me that the question is intended to break down the answer to counsel's own question.

Examiner McKEAG. I think not. Perhaps the question should have been asked before he was asked his opinion, but he may answer subject to your objection.

Mr. CLARK. I am only seeking for particulars of the general statement. Read the question.

(The stenographer read the question as follows:)

"Q. Will you state any particular instances if there have been such on which you base your statement as to the public's understanding of those terms?"

A. I can state one instance. Recently a customer called on the wire for a certain garment that he had been using for several years, and he wanted a certain quantity of them, which we sent to him. After he had received those garments he telephoned to me personally. He happened to be a personal friend of mine in another line of business and he said, "These are not the garments that I want. You have delivered the wrong garments." So I investigated the matter and found that he had received the same garment exactly as he had been in the habit of wearing and purchasing. He informed me no; that it was a different garment entirely. He said, "This is a cotton and wool garment and I have been in the habit of wearing an all-wool garment." I said, "How do you make that out?" He said, "This is labeled on the box, 'Wool and Cotton,' and I will not have that. I have never worn it. I have always worn an all-wool fabric garment." So I explained to him that this was the same garment with a different label on it, and he would not have it. He said, "No; I have got to have an all-wool fabric."

Q. How was the garment previously delivered to him labeled?

Mr. MOLLOY. I move to strike out the last answer of the witness as being based entirely upon hearsay and therefore irrelevant.

Examiner McKEAG. State your objection.

Mr. MOLLOY. I move to strike out the answer on the ground that the witness is testifying to a conversation that some one else had with him, therefore that testimony is hearsay, incompetent, irrelevant, and immaterial.

Examiner McKEAG. That motion will be reserved for a ruling by the commission. You may continue your answer.

By Mr. CLARK:

Q. How were the garments labeled which he had formerly received?

Mr. MOLLOY. I object to that unless you ask the witness if he knows, and then produce the labels themselves. All this testimony is the wildest kind of hearsay testimony. I object to encumbering the record with what somebody told somebody else, ad infinitum.

Mr. CLARK. It is not hearsay in the slightest degree.

Examiner McKEAG. This testimony will be received subject to counsel's objection.

By Mr. CLARK:

Q. How were the garments labeled which he had formerly received?

A. "Natural wool."

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. What do I understand your understanding of the word "merino" to mean as applied to underwear?

A. As it is applied to-day, a cotton and wool fabric; as it  
273 is labeled by the manufacturers and sold to the retailers and by them to the consumers.

Q. And that has been so used during all of your long experience?

A. In this country only?

Q. You had experience on the other side?

A. Yes.

Q. In the underwear business?

A. Yes.

Q. Have you ever seen a merino sheep?

A. No.

Q. Have you ever known of such an animal existing in recent times?

A. I have read of them; yes.

Q. Where are such animals existing?

A. In Australia.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. You do not know whether they exist elsewhere than in Australia, do you?

A. I believe they do, but as to that I do not know.

Q. The cross-examination has brought out the fact that you  
274 have had some experience in England. How is the term "Merino" understood there?

Mr. MOLLOY. I object to that, on the ground that it is outside of the issues in this case.

Examiner McKEAG. It may stand subject to your objection.

A. As an absolutely all-wool fabric of the finest grade.

## Recross-examination by Mr. MOLLOY:

Q. Mr. Rowan, are you acquainted with the Stuttgart product?

A. I am; yes.

Q. Are you acquainted with their fabric which is marketed as a merino garment?

A. No.

Q. Are you acquainted with their fabric that is marketed and marked an all-wool garment?

A. No. I may say as a matter of fact that we have not handled their garments in recent years, only a few that we had in stock when I took hold of it, and I can not speak authoritatively on any of their garments to-day.

Mr. MOLLOY. That is all.

275 CHARLES CAULKINS, was thereupon called as a witness, and having been duly sworn, testified as follows:

## Direct examination by Mr. CLARK:

Q. Where are you employed?

A. James McCreery, 50 West Thirty-fourth Street.

Q. In what capacity?

A. Buyer of men's hosiery and underwear, men's furnishings and umbrellas.

Q. Have you been in the knit underwear trade in any other capacity?

A. As salesman in the underwear department.

Q. For how many years were you a salesman?

A. I was a salesman about six or seven years.

Q. And as buyer?

A. As buyer about eight years.

Q. And as salesman in the underwear department you came in contact with the purchasing public, I presume?

A. Yes.

Q. And as buyer you have had supervision of the salesmen in that department?

A. Yes.

Q. And you have as buyer purchased underwear from vari-  
276 ous American manufacturers?

A. Yes.

Q. And you are familiar with the labels which are put by the manufacturers on the boxes in which they deliver their goods?

A. Yes.

Q. And among those terms you have become acquainted with the terms "merino" and "natural merino" and "natural wool" and "natural worsted"?

A. Yes.

Q. "Gray wool"?

A. Yes.

Q. "Australian wool"?

A. Yes.



Q. From your observation and knowledge gained as a salesman and buyer are you able to state what the average purchaser understands by one or more of those terms?

A. I understand, I will say, that the purchaser understands that a merino garment is a cotton and wool garment.

Q. Generally?

A. Generally; yes.

Q. But you would not say that they all understood that, would you?

277 Mr. MOLLOY. I object to that.

A. I did not come in contact with them all.

By Mr. CLARK:

Q. You have already stated generally?

A. Yes.

Q. But you would not say universally?

A. I would not question every customer that came there who asked for a merino garment, whether he thought he got a wool or a cotton and wool garment, but I think the majority think of a cotton and wool garment when they ask for a merino garment.

Q. What do you think they would understand by "natural wool"?

A. I think they would understand that to be a wool garment.

Q. And "gray wool"?

A. Possibly a wool garment.

Q. And "natural worsted"?

A. A cotton and wool garment.

Q. "Australian wool"?

A. All wool.

Q. Do you buy any all-wool garments?

A. I do.

Q. How are they marked?

278 A. Some of them are marked "all wool." Some of them are marked "pure wool." I use principally imported garments. I have not used any domestic all-wool garments.

Q. Are all of the imported goods so labeled?

A. Not all of them.

Q. How do they differ?

A. Some of them are not labeled at all what they are.

Q. Although they are all wool, as you understand?

A. Now, that I would not say, but what I have been seeing lately as the article of all-wool garments are stamped "all wool." Those are from Cartwright & Warner.

Q. Can you state approximately how much all-wool underwear you purchase in a year?

A. No, sir; I could not say.

Q. Can you state it approximately?

A. In recent years it has been very small.

Q. About how much?

A. Probably sixty or seventy dozen all wool at the outside.

Q. And about what period would that statement apply to?

A. In the last three years I do not suppose we have had more than fifty or sixty dozen.

Q. Prior to that?

279 A. Prior to that we might have used 125 dozen.

Q. As to the mixed cotton and wool garments, are they all labeled with a description of the contents?

A. Just what do you mean by "description"?

Q. I mean such terms as "wool."

A. Some labeled "merino wool," some labeled "natural wool."

Q. Some labeled "wool and cotton"?

A. I have had some this year labeled "wool and cotton."

Q. Now as to the proportion of wool in those mixed garments, does it vary?

A. Yes.

Q. How widely does it vary in the goods marked "merino"?

A. Well, that I don't know.

Q. In selling them you sometimes are asked, are you not, what percentage of wool there is in the garment?

A. About 30 or 40 per cent.

Q. Are you able to tell customers when they ask?

A. Only from what we get from the manufacturers. They tell us how much cotton is in it and how much wool is in it. I could not distinguish it myself.

Q. Can you as a fact from your own inspection tell what percentage of wool there is in a garment marked "Merino"?

280 A. No, sir.

Q. In some I think you stated the percentage of wool may be as low as 30 per cent?

A. Yes.

Q. Any lower?

A. Possibly.

Q. Do you handle any all-cotton garments?

A. Yes.

Q. Are any of them labeled "merino"?

A. No.

Q. How are they labeled?

A. "Balbriggan" and "Sea Island Cotton."

Mr. CLARK. I think that is all.

Cross examination by Mr. MOLLOY:

Q. Mr. Caulkins, you have been a buyer for eight years and a salesman for seven years in the men's underwear department in your store?

A. Yes.

Q. And during that time you have had intimate contact with the general customers of your house?

A. Yes.

Q. And also intimate contact with the trade generally that  
281 deal in men's underwear?

A. Yes.

Q. Has it ever come to your knowledge through the customers of your store that a customer understood a "merino" garment to be other than a garment made of a mixture of wool and cotton?

A. No, sir.

Q. In percentage of garments how would the garments all wool compare to the entire turnover in your underwear department? What percentage would it be, one per cent or two per cent?

A. I should say approximately about five per cent.

Q. In your experience as a buyer for McCreery's have you purchased the produced manufactured by the Winsted Hosiery Company?

A. I have.

Q. And you are acquainted with their products?

A. Some of them.

Q. In the labels used by the Winsted Hosiery Company is a number known as "Men's Natural Merino Shirts," introduced in this proceeding as Exhibit 1. What would you understand from an inspection of that label to mean?

A. A cotton and wool garment.

Q. There is another brand put out by the Winsted Hosiery  
282 Company known as "Men's Gray Merino Shirts," being Exhibit No. 2 in this proceeding. What would you understand would be the contents of that garment?

A. Cotton and wool.

Q. There is another number known as "Men's Gray Merino Shirts," being Exhibit 3 in this proceeding. What would you understand to be the contents?

A. "Gray Merino Shirt"?

Q. "Gray Merino Shirt."

A. Cotton and wool.

Q. In purchasing all-wool garments is it not a fact, Mr. Caulkins, that the box containing the garment or the label marking it, or the garment itself specifically indicates that it is an all-wool garment?

A. I would not say in all cases, but I know that a great many are stamped "all wool" on the garment, not on the label.

Q. If they are not stamped on the garment is not that fact marked on the label?

A. Not to my knowledge.

Q. Have you ever known of an instance where it was not marked "all wool"?

A. Well, I can not answer that. I don't know.

283 Q. In buying merchandise from the Winsted Hosiery Company under the label of "Men's Natural Worsted Shirts," being Exhibit No. 4 in this proceeding, would you understand that you were obtaining an all-wool garment?

A. No, sir.

Q. What would you understand that you were obtaining?

A. Cotton and wool mixed.

Q. And in purchasing from the Winsted Hosiery Company the products branded by them under the style of "Men's Natural Wool Shirts," being Exhibit 5 in this proceeding, what would you understand were the contents of that garment?

A. "Natural wool."

Q. "Men's natural wool shirts"?

A. I should take that to be an all-wool garment.

Q. What would persuade you to that belief, Mr. Caulkins?

A. Just the words "natural wool."

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. Have you ever bought any imported mixed wool and cotton goods?

A. Not recently; no.

284 Q. In the past?

A. Yes; probably five years ago, before the war.

Q. How were they marked?

A. "Merino."

Q. With any additional label?

A. Not to my knowledge. That is going back so far.

Q. Did you bring with you any sample of imported or other goods?

A. I brought a sample of cotton and wool hose and of all-wool hose, English.

Q. From whom did you purchase them?

A. Thomas Lisle, importers.

Q. Do they also import underwear?

A. No, sir.

Q. How are they marked?

A. One was marked "cotton and wool," the other was marked "all wool."

Q. In your answers to the cross-examination in relation to what you understood by the terms, you spoke in your capacity as a buyer?

A. As a buyer and a salesman both.

Mr. CLARK. That is all.

285 Recross-examination by Mr. MOLLOY:

Q. And also as one through an experience of fourteen years—

A. Fifteen years.

Q. Fifteen years in these capacities, as coming in contact generally with the customers that trade at your house?

A. Yes.

By Mr. CLARK:

Q. But you have stated that you understood the public understanding of the terms "natural wool," "gray wool," "natural worsted," and "Australian wool" to be all wool?

Mr. MOLLOY. He has not so stated at all.

Examiner McKEAG. The record will speak for itself.

Mr. CLARK. I want to make it clear that in answering the last question he does not wish it to be understood that he speaks for the understanding of the public in saying that these goods under those labels are understood to be wool and cotton.

Mr. MOLLOY. I object to that, because my question is very plain and distinct, and the witness has answered it.

Examiner McKEAG. I will have to enforce the rule that there must be no colloquy between counsel. If counsel has an objection  
286 to make, let him make it and state it in the fewest possible words. This debate must be stopped.

Mr. CLARK. I submit his coming in contact with the public has nothing to do with my question as to whether he spoke as a salesman and buyer.

Examiner McKEAG. You may ask him any question you want to.

By Mr. CLARK:

Q. Your answer in response to cross-examination as to what you understood by those terms expresses your own understanding as a salesman and buyer?

A. And I think it expresses the customer's understanding as nearly as I can tell.

Q. I will ask you if you did not state on direct examination that the public understood by the term "natural wool" an all-wool garment?

A. "Natural wool," yes, an all-wool garment.

Q. And as to Australian wool?

A. An all-wool garment.

Q. And as to "gray wool"?

A. An all-wool garment.

Q. So as to those at least when you said they meant cotton and wool you spoke from the point of view of one in the trade?

A. And one of the customers also.

287 Q. Not as to those terms "natural wool" and "gray wool."

A. "Natural wool," "gray wool," and "Australian wool" that they would take it for granted that they were all-wool garments but "merino wool" would be considered cotton and wool.

Mr. CLARK. I think that is plain.

Examiner McKEAG. It was plain before—to me, at least.

WILLIAM C. LYONS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. State your present business.

A. Hosiery and underwear buyer for John Wanamaker, New York.

Q. How long have you been employed in that capacity?

A. As buyer?

Q. Yes.

A. Six years.

Q. Have you been employed in any other capacity in connection with the underwear trade?

A. Yes, as assistant buyer and salesman.

Q. For how many years approximately in those capacities?

288 A. Twenty-five.

Q. Where?

A. The same place.

Q. And in your experience you have had occasion to become familiar with the manufacturer's labels of underwear?

A. Labels, yes.

Q. On the boxes?

A. We do not pay any particular attention to the labels on the boxes.

Q. As a matter of fact you know, do you not, some of the labels that are used on the boxes?

A. Yes.

Q. Do you recognize the terms "natural merino" and "natural wool" and "gray wool" and "natural worsted" and "Australian wool" as among them?

A. I do.

Q. Do you use the term "merino" at Wanamaker's on underwear?

A. No, sir.

Q. Why not?

A. Three or four years ago we found that the word "merino" meant half a dozen things entirely different from what it is  
289 generally known in our trade to be, and we stopped using it.

Q. And what were some of the half dozen differences?

A. I could not tell you offhand now. One was a mixture of cotton and wool, others all wool I believe, and shoddy, and two or three other explanations.

Q. In your experience have you known of the term "merino" being applied to all cotton garments?

A. No, sir.

Q. You say some understood it to mean "all wool"?

A. A good many years ago, yes.

Q. When you say a good many, how many?

A. Thirty.

Q. Would that be a reason for your abandoning that term recently?

A. No.

Q. Then you understand that at one time the term "merino" meant all wool?

A. Yes, as I say a good many years ago.

Q. And did it mean any particular quality of wool?

A. I believe it did.

Q. And what peculiar quality, if any?

A. Merino wool of the merino sheep in some foreign land or something. I have forgotten just exactly where.

290 Q. Was it a high or a low grade?

A. A very high grade.

Q. From your experience has the term "Merino" been applied to a wide range of garments as respects the proportion of wool in them?

A. Yes.

Q. To how low or small a proportion of wool have you known it to be applied?

A. Quite recently we analyzed one called "Merino" by the manufacturer that had 11 per cent of wool in it. I do not know of any that went lower than that.

Q. How high a proportion of wool have you known to be labeled "Merino"?

A. 75 per cent.

Q. What do you label your mixed wool and cotton underwear?

A. Cotton and wool mixed.

Q. How long have you been using that label?

A. About three years.

Q. Do you buy any all-wool underwear?

A. I do.

Q. Can you state approximately the amount either in money value or dozens a year?

A. Approximately?

291 Q. Yes.

A. Selling price or cost?

Q. Cost. That would be market value represented by your annual purchase of all-wool underwear.

A. For men, women and children, or just men?

Q. All.

A. Oh, say \$8,000 at cost.

Q. And that represents about how many dozens approximately?

A. It is pretty hard to say. I should say two or three hundred maybe.

Q. And does that apply to domestic manufacturers of all wool underwear alone?

A. No.

Q. It includes imported?

A. Yes.

Q. Are you familiar with the markings on the imported all-wool garments?

A. Yes.

Q. What are they?

A. The all wool are marked "All wool," "Guaranteed all wool," "Pure wool."

Q. Do you import any mixed cotton and wool underwear?

A. We do.

292 Q. How are they marked?

A. Not marked at all—that is, that we buy. They do not have any marks on them.

Q. Either on the garment or the container?

A. The box is labeled, but the garments are not.

Q. How would the box be labeled?

A. "Cotton and wool mixed" or "all wool," as the case may be.

Q. But the cotton and wool garments would be marked how?

A. "Cotton and wool mixed."

Q. In your long experience you have come in contact with the public purchasing underwear?

A. Yes; I have.

Q. Are you able to state what the average purchaser understands by the label "Natural wool" as applied to underwear?

A. If they had occasion to see the label on the box I should imagine they would think it would be all wool.

Q. And what would be their impression if they saw the label "gray wool"?

A. The same thing—all wool.

Q. And "natural worsted"?

A. That is hard to say what the public would take it to be. I could not answer that so very well, because we do not carry  
293 much of that merchandise in our establishment.

Q. And "Australian wool"?

A. All wool.

Q. For my information will you define the term "Worsted" as used in underwear?

A. I can only define it from my experience and from no other. If a manufacturer tells me it is worsted I would consider it a cotton and wool mixed garment.

Q. Will you state generally what you understand by the term "Worsted," irrespective of whether it is in underwear or any other fabric, as distinguished from wool?

A. I could not answer that. I have had no experience outside of my own line.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. You stated that for the last thirty years you understood that the word "Merino" meant a mixture of wool and cotton?

A. Yes. I would not say that far back. But thirty years ago we sold merino underwear as an all-wool garment.

Q. But since then you have understood it to be a mixed garment?

A. Merino—absolutely.

294 Q. A mixture of wool and cotton?

A. Yes.

Q. And the mixture varying in percentage according to the different products of the manufacturer?

A. Right.



Q. And that use and understanding of the term "merino" has been generally understood with those that you have come in contact with in your store for the same period?

A. As a mixture of cotton and wool?

Q. Yes.

A. To the best of my knowledge and belief, yes.

Q. And you have never heard it questioned otherwise by those you have come in contact with in the last twenty years, we will say?

A. I do not think so; no.

Q. In your capacity as buyer for Wanamaker's do you buy a product known as the production of the Winsted mills?

A. We have; yes.

Q. And are you acquainted with the number that they put up under the label "Men's Natural Merino Shirts"?

A. I don't know whether I am acquainted with the number or not. I know the line. That is all I know.

295 Q. You know the line of shirts that the Winsted mills manufacture when they use the term "Merino"?

A. Yes.

Q. On their labels?

A. Or mention to me when they show the samples as merino.

Q. Or on the boxes, the labels used to designate their product?

A. I have not seen the boxes or labels at all.

Q. You have seen the boxes containing the garments produced by the Winsted mills?

A. As the merchandise is delivered to my store; yes.

Q. And the boxes carry the label?

A. They do.

Q. And that label, in the description of their product as they use the word "Merino" in connection with the description of their various products?

A. I think they do; yes.

Q. And where that word "Merino" appears on their brands or labels it has been your understanding for the past twenty years that that represents a product consisting partly of wool and partly of cotton?

A. Yes.

Q. And you buy it from them as such?

296 A. Yes.

Q. And you sell it to the general public as such?

A. We did until a few years ago, since which time we have sold it as cotton and wool mixed.

Q. Coming down to a few years ago, was your attention called in the newspaper to an account of a proceeding brought by the Federal Trade Commission attacking the use of the word "Merino" and other labels by underwear manufacturers?

A. No, not until a few months ago.

Q. Do you know whether that proceeding was started a few months ago or a couple of years ago?

A. As far as I know, a few months ago is all I know about it.

Q. But the discontinuance of the marking of the product of wool and cotton in your recollection goes back for only a couple of years?

A. Three years, I think.

Q. About three years?

A. Yes, in our store.

Q. And that also applies to foreign merchandise coming into this market?

A. Absolutely.

Q. And before that the foreign merchandise that was a mixture of cotton and wool was bought and sold generally under  
297 the term "Merino" just the same as the domestic, was it not?

A. Yes.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

OTTO ROSENBERG was thereupon called as a witness and having been duly sworn testified as follows:

Direct examination by Mr. CLARK:

Q. Please state your business.

A. Buyer of men's underwear for B. Altmann & Company.

Q. How many years have you been employed in that capacity?

A. Thirty-five.

Q. Have you had any experience as a salesman?

A. Yes; twenty-five years of that time.

Q. In underwear?

A. Only underwear; yes.

Q. As salesman and buyer you have come into contact with the purchasing public of underwear?

A. Yes.

Q. And as buyer have you been in charge of the sales people in that department of Altmann's?

A. I have.

Q. Has your experience of twenty-five years been at Alt-  
298 mann's entirely?

A. Entirely.

Q. You have purchased and handled as salesman the products of numerous American manufacturers of underwear?

A. Yes.

Q. And you have become acquainted with the labels that the manufacturers place on the boxes in which they deliver their products?

A. Yes.

Q. Such as "merino" and "natural merino" and "natural wool" and "Australian wool" and "natural worsted"?

A. Yes.

Q. Can you state from your experience and observation what the average purchaser understands by the term "Merino" as applied to underwear?

A. They understand it cotton and wool, but there are very few people who speak of merino. The public very seldom use the term "Merino." I have very seldom heard them use it.

Q. Would you say that they all understood it to be cotton and wool?

A. Yes; that is what I understand it. I have not seen anything else but cotton and wool in my time marked "Merino."

Q. And so as a buyer you understand the term to mean cotton and wool?

A. Yes.

Q. But I am speaking of your observation of the public understanding.

Mr. MOLLOY. One moment, please. I object to counsel putting the question after the witness has given him a categorical answer to a very positive question. The question now proposed to the witness is one intended to mislead and to question the accuracy of the answer given to the previous question; in other words, an attempt to impeach the witness's testimony.

By Mr. CLARK:

Q. Do you distinguish between the trade understanding of the term and the public understanding of the term?

A. The public, just as I say, very seldom asks for merino. I have heard the term used very little by the customers.

Q. How does that statement bear on the question of the public's understanding, in your mind?

A. As I say, cotton and wool are the two items that are mentioned—cotton and wool.

Q. And as to the term "natural wool," how would you say the public understand that?

300 A. They will ask for wool; yes.

Q. They will expect wool?

A. They will expect wool.

Q. And as to the term "Gray wool"?

A. Anything that is marked "wool"; they look for wool.

Q. And the same as to "natural worsted"?

A. They know very little about worsted.

Q. What amount of wool do you understand the public expects to find in a garment labeled "Merino"?

A. Well, we are getting all qualities. In some goods I will get one-third and in some get three-quarters.

Q. Does the term "Merino" mean anything?

A. As I understand merino, anything that is cotton and wool—anything that has cotton and wool in it.

Q. Do you understand that the public so understands?

A. Yes.

Q. Without regard to the proportion of wool in it?

A. No; they will inquire what proportion is in it.

Q. That is the term "Merino" does not indicate to them the proportion of wool?

A. No, sir.

Q. Do you purchase any imported underwear?

301 A. I do; yes.

Q. All wool?

A. Pure wool.

Q. And mixed?

A. Wool mixed; yes.

Q. How is the imported all-wool underwear labeled?

A. Marked "Natural wool."

Q. And the imported mixture of wool and cotton?

A. "Gauze merino" is the only thing I remember over there, of cotton and wool.

Q. Alone, without any additional words?

A. Just "gauze merino"; yes.

Q. Do you know the percentage of wool in garments imported that are so labeled?

A. That which I bring over I myself figure 60 per cent of wool. We bring over one that has probably 75 per cent.

Q. How is that labeled?

A. That is labeled "India Gauze Merino."

Q. Can you state approximately the amount either in value or in dozens of the all-wool underwear that you purchase annually, including both imported and domestic, if any?

302 A. In imported all wool I would say—do you want the present year or previous years?

Q. Previous years.

A. Previous years, 400 dozen a year.

Q. About what value would that represent?

A. About \$12,000.

Q. What do you understand by the term "Merino wool," not as applied to underwear but as applied to the fiber?

A. I could not answer that myself. I am not acquainted with that, except I think I have seen dress goods called "Merino wool," but never underwear, whether they were pure wool or not.

Q. Are you acquainted with the manufacture of yarns?

A. No, sir.

Q. What do you understand by the term "Worsted," not as applied to underwear but generally as applied to any goods so termed?

A. All-wool cloth, worsted cloth.

Q. What do you understand by the term "Australian wool" generally?

A. Wool goods.

Q. Any particular wool?

A. Fine wool goods.

Q. Any particular source or place?

A. No, sir.

303 Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Rosenberg, you have had 35 years' experience in the underwear branch of your business?

A. Yes.

Q. And during that time as salesman for 25 years you had constant and intimate contact with the customers of B. Altmann & Company?

A. Correct.

Q. B. Altmann & Company are one of the large stores in New York, are they not?

A. Yes.

Q. And the underwear department is a substantial department in the business of that house?

A. Yes.

Q. And has been such for the last 35 years?

A. Yes.

Q. How does the percentage of all-wool garments in numbers compare to all of the underwear garments sold in your department?

A. Well, I should think about one-third.

304 Mr. MOLLOY. That is all.

EDWARD MCINTYRE was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live?

A. Caldwell, New Jersey.

Q. What is your business?

A. Buyer.

Q. For whom?

A. Brooks Brothers.

Q. Where are they located?

A. 449 Madison Avenue.

Q. In what department are you buyer?

A. Men's furnishings.

Q. Including underwear?

A. Yes.

Q. And you buy in that capacity the product of various American manufacturers?

A. I do not—all imported.

Q. And what goods do you import—that is, what make?

A. Allen Solley & Company and I. & R. Morley.

305 Q. They are English manufacturers?

A. Yes.

Q. Do you import only all-wool goods from them?

A. No; both kinds.

Q. And how are the all-wool garments labeled?

A. Labeled on the boxes, "Lambs' wool."

Q. And the garments?

A. No label at all.

Q. How are mixed cotton and wool goods labeled?

A. We only buy cotton and wool in merino.

Q. Under the term "Merino?"

A. Yes.

Q. Will you state the amount of your importations of all-wool garments, if you can, approximately, say three or four years ago?

A. Very small. I should say about fifteen dozen.

Q. And at the present time?

A. Still small. Everything is cotton and lisle.

Q. You purchase no domestic underwear?

A. No. That is, not in knit goods.

Q. In linen, do you?

A. In madras.

306 Q. Are there other foreign manufacturers of all-wool garments to your knowledge, besides those you have named?

A. I think so, but we have not bought from them.

Q. Irrespective of the application of the term to underwear, what do you understand by the term "merino" as applied to wool?

A. Merino—wool and cotton.

Q. No, as applied to wool.

A. Applied to wool?

Q. Yes.

A. A mixture.

Q. I said as applied to wool alone.

A. No, you can not put them together. One is a wool and the other is a mixture, or else I do not get you right.

Q. Do you know of a grade or quality of wool known as merino wool?

A. Yes.

Q. And what is it, what is the distinct quality of that?

A. A very soft merino wool and cotton mixed.

Q. You state that it is combined of a soft merino wool and—

A. And cotton mixed, yes.

Q. What do you mean when you say a soft merino wool, as far as the term "merino" goes?

307 A. It is not twisted hard—the thread—very soft.

Q. That is indicated by the term "soft," is it not?

A. No; the merino wool is soft.

Q. It is then distinguishable by that quality from other wool?

A. I do not understand.

Q. You describe this garment as composed of soft merino wool.

A. Yes; the ones we have.

Q. And you say that one quality of merino wool is that it is soft.

A. Yes.

Q. And that is determined by the fineness of the fiber?

A. The fineness and softness, yes.

Q. Where is that peculiarly soft and fine wool procured?

A. I never had occasion to find out.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Your underwear department is a large department in your house, is it?

A. No; it is small.

Q. In buying imported merino wool underwear you always understood that to be a mixture of wool and cotton?

308 A. I understood it to be a mixture of merino wool and cotton.

FREDERICK T. HOOPER, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Buyer for Gimbel Brothers, New York.

Q. In what department?

A. Hosiery and underwear.

Q. How long have you been with Gimbel Brothers?

A. Four years.

Q. In that capacity alone as buyer?

A. Yes.

Q. Have you had any experience elsewhere as a salesman?

A. Some years ago.

Q. Do you buy any imported wool underwear?

A. I do.

Q. And wool and cotton mixed imported underwear?

A. I do not.

Q. Are you familiar with the markings of any imported English mixture of wool and cotton goods?

A. English alone do you speak of?

309 Q. Yes.

A. Yes; English, French, and German.

Q. Mixed goods?

A. Yes.

Q. How are they labeled?

A. "Wool and cotton" if the percentage of wool predominates and "Cotton and wool" if the cotton predominates.

Q. In your business in labeling your goods or in showing them with the labels on them do you use the terms or labels "Natural wool"?

A. Do we use that label?

Q. Yes.

A. We do if the manufacturer puts it on.

Q. As a matter of fact do you buy any goods so labeled?

A. Yes; I believe we do.

Q. And what do you understand by that term?

A. My personal understanding?

Q. Yes.

A. Personally, I would understand it to be wool. Preceded by the word "Natural" I would understand it to be wool.

Q. And the term "Gray wool"?

A. It might be anything.

310 Q. And "Natural worsted"?

A. Natural worsted would be wool and cotton.

Q. And "Australian wool"?

A. If it would be preceded by the word "Pure" I would say it was pure Australian wool—pure wool.

Q. Just the term "Australian wool."

A. The term "Australian wool" might not mean that it was pure wool.

Q. And what do you personally understand by the term "Merino"?

A. Technically?

Q. No; just your own understanding.

A. My own understanding?

Q. Yes.

A. "Merino" is wool and cotton mixed as applied to underwear.

Q. What from your experience in dealing with the public do you understand that the public understand the term to mean?

A. The same as mine would be.

Q. And the term "Natural merino"?

A. "Natural merino"—I can not say that I have ever seen it used.

Q. So you are not able to say what the public understands it?

A. No.

311 Q. What do you think the public understands by the term "Natural wool"?

A. "Natural wool" would be pure wool, I should think.

Q. And "gray wool"?

A. "Gray wool" might be either pure wool or part wool.

Q. "Natural worsted"; what do you think the public understands as to that?

A. "Natural worsted"—I would not be able to answer that.

Q. By the term "Australian wool"?

A. I should have to give you the same answer that I gave you before on that.

Q. From whom do you buy your imports of all wool underwear?

Mr. MOLLOY. The witness has testified that he has not bought any.

Mr. CLARK. Then I misunderstood him.

A. All wool I do buy, not wool and cotton. The last I bought was from Two Steeples (Ltd.).

Q. And that came labeled how?

A. "Pure Australian Wool."

Q. Can you state approximately the purchases for Gimbel's of all wool imported underwear say, for the last five years, in value?

312 A. No; I could not. I would not commit myself on that because I have not the figures in my mind.

Mr. CLARK. That is all.



Cross-examination by Mr. MOLLOY:

Q. Mr. Hooper, it is your understanding, both as a buyer and generally, as one of three years' experience in your department, coming in contact with your customers, that the word "merino" means a mixture of wool and cotton?

A. Speaking from the standpoint of the understanding of the customer, yes.

Q. You said you were familiar in the last few years with the importations of foreign mixed goods?

A. Yes.

Q. And that they were marked "Wool and cotton" if wool predominated and "Cotton and wool" if cotton predominated?

A. Yes.

Q. Isn't it a fact that those articles have only been so labeled in the last few years?

A. Probably that is true. I would not be able to state that as a fact.

Q. From your experience with foreign goods imported into this country that are made of a mixture of cotton and wool, do you know that they have in the past been described as "Merino" underwear?

A. Well, the mixed have been described as "Merino" underwear, yes.

Q. And that applies to the foreign product imported into this country as well as the domestic product manufactured in this country?

A. I have had no experience with anything stamped "Merino" that was of foreign manufacture.

Q. Are you acquainted with Morley?

A. Yes.

Q. Do you know that they make a standard number of their mixed goods and designate it "Merino"?

A. I don't know. I have not purchased it.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. When you stated that it was probably true that the label you have described on mixed imported underwear of "cotton and wool" or "wool and cotton" had obtained for a few years, can you state a little more definitely what time you mean by that? Do you think they were so labeled three years ago?

314 A. I would not be able to answer that question.

Q. You can not say?

A. Offhand I could not. The records might show it, but I would not want to commit myself on that.

(Whereupon, at 3.55 p. m., November 16, 1920, the above hearing was adjourned until November 17, 1920, at 10 a. m.)

315 NEW YORK, N. Y., *November 17, 1920*—10 a. m.  
Met pursuant to adjournment.

Appearances: The same as yesterday.

ARTHUR M. REIS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by MR. CLARK:

Q. What is your business?

A. Underwear.

Q. Where?

A. Broadway and Nineteenth Street.

Q. And what is the name of the house?

A. Robert Reis & Company.

Q. In what capacity are you connected with the company?

A. President.

Q. Are you manufacturers?

A. Manufacturers and jobbers both.

Q. Where do you manufacture?

A. At Waterford, New York, and at Baltimore.

Q. What are the names of the mills?

316 A. The Ford Manufacturing Company at Waterford and the Towels Manufacturing Company at Baltimore.

Q. What about Glastonbury?

A. We are their eastern sales agent and we take a good part of their output.

Q. Do you manufacture any all wool underwear?

A. No, not all wool.

Q. Do you handle any?

A. Yes; we handle it in a limited degree.

Q. Whose make?

A. One of our western mills. We prefer not to divulge the names of our mills, and we put all of our goods out under our own brand.

Q. Are you manufacturing them or buying them?

A. With the exception of a few lines for whom we act as salesmen, like B. V. D. underwear and Glastonbury; other than that it is practically our own brand of merchandise.

Q. How do you label or brand on the box your underwear composed of cotton and wool?

A. Reis underwear. We do not indicate in any way the component qualities of the merchandise.

Q. Have you at any time heretofore used descriptive words?

317 A. Many years ago we coined certain labels or brands, in 1900 and probably before then, such as "Dollar silk underwear." That was a name that we coined, which was descriptive in a sense, but it was really a coined brand or label, a popular brand; "American silk underwear," and names of that kind.

Q. Have you ever used the term "Merino" on labels on your goods?

A. Never in Reis underwear; no. We have used it in some of the lines we have sold.

Q. That is, the manufacturers have put such a label on their boxes?

A. Yes.

Q. Do they now?

A. I believe in certain instances. I can not recall just whether we are using that now, but we have used it in the past, used it many years, and possibly some of our merchandise is so marked to-day.

Q. Do you recall any change in that respect?

A. Not in so far as the word "Merino" is concerned, other than that in so far as our own brands of goods are concerned we have dropped all terms of description, and just mark them "Reis's." Whether the word "Merino" is one of the words we have dropped I can not recall at this time.

Q. Do you remember my talking to you some week or two ago?

318 A. Yes.

Q. And my recollection is—see if I am right about it—that you at that time stated that you had discontinued the use of the word "Merino"?

A. Just as I mentioned now, I believe we dropped all designating terms. That was our intention. Whether we have actually carried it through in every instance I can not say offhand. We have about 2,000 styles in our line, and it was our intention to drop all terms of description.

Q. What was the reason for your taking that course generally?

A. We believe in laying all emphasis on our own brands of goods, and just employ the word "Reis's" to stand for all different kinds. I am referring now to the Reis's brand, to the word "Reis's" as the designating brand.

Q. I understand you to say that on the goods which are manufactured by mills which you own and also others; that is the fact?

A. To a limited degree where we take the output or a part of the output of others.

Q. Can you state as to the use of the labels on the Glastonbury output?

319 A. I have not really looked at the labels for sometime on the Glastonbury goods. We have been selling Glastonbury underwear and acting as agents for Glastonbury for many, many years, and I have really not investigated or looked at those labels recently. My recollection is that the word "Merino" has been used by Glastonbury for many years.

Q. You can not state whether there has been a change by them in that respect?

A. I can not say as far as the word "Merino" is concerned. I know we have recently seen some brands on Glastonbury. Where we have called the garment "wool" we have made certain changes

Q. What changes?

A. I think we changed the word "natural."

Q. Adding it?

A. Omitting the word "wool," designating the color of the garment; that is, as far as the Glastonbury line is concerned.

Q. You are familiar with the labels that have been used heretofore by American manufacturers of underwear such as those that you have mentioned?

A. Yes.

Q. In your opinion is there any ambiguity in the understanding of the public as to the meaning of the term "Merino" used on labels?

A. No; "Merino" is a term that has been used during my  
320 entire experience in business, and has a meaning that has been generally accepted since the time I have been in business, which has been about 18 years.

Q. Is there any distinction to be made in the understanding of the term as between the trade; that is, manufacturers and dealers in underwear, and the purchasing public who are not in the trade in any way?

A. In so far as the word "Merino" is concerned?

Q. Yes.

A. I don't believe so.

Q. Do you think it is universally understood by the public and by the trade?

A. It is universally understood by the trade, without question. I being in the business so many years, the word "Merino" means something very clearly to me. I can not give the consumer's point of view.

Q. You are not able to state?

A. Not from the public, but I do not think there is any question that the word "Merino"—we train our dealers—our dealers know just what the word "Merino" means. Our men know it and we ourselves know it.

Q. But you can not state from your own knowledge?

321 A. We have trade conferences with the retail clerks of our stores. We have those conferences occasionally, and we have trained them in all these years to know what the word "Merino" stands for, and I do not question that those salesmen in turn will sell the goods as "Merino" meaning a combination of cotton and wool.

By Examiner McKEAG:

Q. Did you ever find any salesmen who were under the impression that "Merino" meant wool?

A. All wool?

Q. Yes; before you trained them?

A. No.

Q. You stated that you manufactured or handled some all-wool underwear?

A. Yes; we do.

Q. And you know your competitors among American manufacturers and dealers in that line; that is, you know of other American all-wool underwear makers?

A. I believe there are some goods made all wool. I do not believe any one factory produces all-wool exclusively, but there are of course all-wool goods made.

Q. A number of such?

322 A. There is not a very large quantity; no.

Q. But there are a number of manufacturers who make some all-wool goods?

A. Some all-wool goods, I believe to a very limited extent. An all-wool garment has never proven to be a satisfactory garment to the consumer.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Reis, is it not a fact that the policy of your house in marking and branding your merchandise "Reis underwear" is to establish the trade name of "Reis" as applied to the distribution of underwear?

A. That is correct.

Q. And the discarding of various brands and labels which it had been customary to mark your products previous to that policy, the abandonment of those various brands and labels was entirely due to the policy of the house in featuring the word "Reis's" and advertising its trade name?

A. That is correct.

Q. Did you have occasion to notice in the last two or three years the announcement of a proceeding brought by the Federal  
323 Trade Commission against the Winsted Hosiery Company, which is this proceeding, alleging the improper use of branding and labeling of underwear?

A. I did.

Q. Is it not a fact that the abandonment of the word "wool" on labels where it had previously been used in conjunction with phrases like "natural wool" has taken place since the commencement of that proceeding?

A. Yes.

Mr. CLARK. I object that he is not shown to have knowledge. He is asked a very general question, that these changes have been made since that time.

Examiner McKEAG. The answer may stand subject to your objection.

By Mr. MOLLOY:

Q. What would you say was the percentage in volume, the total turnover of underwear garments, of those made entirely of wool as compared to those made of other fabrics?

A. I could not express that in percentages, because it is a fraction.

Q. Would it be one per cent?

A. It would be considerably less than that.

324 Q. Is it not a fact that manufacturers in making, and distributors distributing an all-wool garment, mark the garment itself, that the garment or the container is marked specifically "all wool"?

A. I think that is generally the case; yes.

Q. You have stated that policy of your house.

A. We mark our all-wool garments with a little blue label which we put right under our Reis's tag, this little blue tag being marked "all wool," and put right under the Reis's label.

Q. You do not mark with any such designating term any of your other merchandise that you distribute or manufacture where the contents are part wool and part cotton?

A. No.

Q. You stated that it is the policy of your house to have conferences in your trade, and with your retail salesmen who distribute your merchandise. Have you ever heard anyone express a doubt or an ambiguity as to the meaning of the word "merino" at those conferences?

A. No, sir.

Q. Did you ever hear any of the salesmen express any uncertainty of the purchasing public that the salesmen came in contact with, as to the meaning of the word "merino"?

325 A. No.

Q. I show you an advertisement which purports to advertise the product of the Glastonbury underwear, in which your name appears as distributor, and I tell you that it was taken from the daily press within the last few days. If there is any doubt about it I can get the original issue. I will ask you whether you are familiar with that advertisement?

A. Yes.

Q. And it represents an advertisement inserted by yourselves in advertising the product of the Glastonbury Mills, of which you are the eastern representative.

A. This has been done in conjunction with the Glastonbury Knitting Company.

Q. And it is an advertisement appearing in the current papers?

A. Yes; it continues and will continue throughout this fall season.

Q. I call your attention to the part in the advertisement which refers to a worsted merino garment.

A. Yes.

Q. And I ask you whether that is a garment which your house is now distributing to the trade?

A. It is.

Q. And is that a garment made partly of wool and partly of  
326 cotton—cotton and wool mixed?

A. Yes. Otherwise we would designate it as pure worsted.

Mr. MOLLOY. I offer it in evidence.

(The advertisement so offered and identified was received in evidence, marked "Exhibit 7," offered by respondent, and is forwarded herewith.)

Q. You have been in the business for approximately 18 years?

A. About that; yes.

Q. Aside from those mills and distributors who label and brand their merchandise by their trade names or special trade phrase, has it not been the custom for the manufacturers and distributors to brand their merchandise by some descriptive phrase?

A. Yes. You refer to unbranded goods?

Q. I am speaking now of unbranded and untrade-marked goods

A. Yes.

Q. So that two ways of branding or labeling merchandise are in vogue, one by those who establish a trade name and feature their product under that fashion, and another who use descriptive terms to indicate the garment which they are distributing and selling?

A. Yes.

327 Q. That custom of manufacturers, other than trade-marked articles, is a custom that has existed all during your experience in the underwear trade?

A. Yes.

Q. I will ask you if it has not been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as "Natural merino," "Wool," "Natural wool," "Natural worsted," and "Australian wool," when in fact such underwear so described is not composed wholly of wool and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served; that this custom and practice is general and universal in the underwear trade throughout the United States, and is followed by the manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool, and are branded and labeled as "all wool?" Is that correct?

A. That is correct.

Q. Are you familiar with the importation of underwear into the United States?

A. To a measure; yes.

328 Q. Has not that same general custom prevailed as to imported underwear as well as domestic?

A. I think that is true.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. In your answer to the question covering the use of certain labels which counsel has named, the statement was that the use of those particular labels was universal. You do not mean to be understood as saying that everybody uses those labels, do you?

A. I understood the word "universal" as meaning the generally accepted term in the industry.

Q. Generally?

A. Universal to the extent of generally; yes; meaning that it is generally used in the trade, which is a statement of fact to my knowledge.

Mr. CLARK. That is all.

By Examiner McKEAG:

Q. There may be certain exceptions to that general policy?

A. Well, I would not know any offhand, but there is such a possibility; yes. But I would not know any offhand.

329 By Mr. CLARK:

Q. You state that in your own case you do not use descriptive terms.

A. I believe the question was put, with the exception of such concerns as are using their own brands.

Mr. MOLLOY. Yes; I so limited my question.

By Mr. CLARK:

Q. What was your answer to that question?

A. That it is generally done by concerns using descriptive terms. Concerns that do not use descriptive terms, of course, that would not apply here at all.

Q. And there are many of those?

A. There are concerns that do not use descriptive terms, where they feature the brand, but there are a great many concerns who do feature the brand who also use such terms regardless of the fact that they emphasize their brand. We do not happen to do that, although we have done it in the past.

Q. Can you name others who do not do it, but follow your practice?

A. I could name those without any feeling of certainty about it. I do not believe, as far as I remember, that Munsing  
330 union suits are designated with any description, but I am not certain about that. I know our own brand, but I do not know about the brands of other concerns.

Recross-examination by Mr. MOLLOY:

Q. Glastonbury have been a popular trade-mark house for a great many years?

A. Since 1853, I think.

Q. And also use descriptive words in branding their merchandise?

A. Yes; I have that concern in mind.

Q. I assumed you did.

A. Yes.

Q. When concerns follow the other practice of using a trade name alone, and therefore do not use the descriptive phrase to indi-



cate their merchandise, is it not a fact that the merchandise put out by them varies in the percentage of wool and cotton mixture?

A. Decidedly.

Q. Is there any distinction made in the trade-mark name as to the varying percentages of the garments?

A. No.

Q. What would be the limit of the range of the merchandise  
331 made of a cotton and wool mixture?

A. Unlimited, as long as they have a mixture.

Q. So it might range from one per cent to 99 per cent?

A. Well, I take it that that has been the case; yes.

Q. But generally it would range between 20 and 80 per cent, would it not?

A. Yes.

Q. And in garments made of a mixture in those varying percentages, a trade-mark house in merchandising and distributing their product would not make any distinction in the labeling of their product?

A. Such concerns do not use descriptive terms.

Redirect examination by Mr. CLARK:

Q. Are you familiar with the labels used at present by Glastonbury?

A. As I stated before, we have been distributing Glastonbury for so many years that I really have not investigated their labels in any thorough way.

Q. Can you say whether or not at the present time they use the words "cotton and wool" on some of their goods?

A. I do not believe so. I think they are designated by  
332 "Merino."

Mr. MOLLOY. I can tell you that they do not.

Mr. CLARK. I can say that they do.

By Mr. CLARK:

Q. You do not know?

A. I do not believe so. I have not looked at the labels recently.

JOHN I. MORTON was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. I am in the manufacturing of underwear and clothing.

Q. You are the president of the Hanifen Company?

A. No, sir; I am the vice president and general manager of the John E. Hanifen Company.

Q. Located in Philadelphia?

A. Yes.

Q. Do you make all-wool underwear?

A. We do.

Q. And mixed underwear?

A. Yes.

333 Q. In the manufacture of all-wool underwear you are in competition with other manufacturers of all-wool underwear in this country?

A. That would be natural to suppose, sir.

Q. There are other manufacturers of all-wool underwear?

A. I believe there are. I am not sure of it.

Q. Can you state approximately the extent of your production of all-wool underwear in the past years, either in the value represented or in the dozens of garments?

A. There is a memorandum taken roughly from our books by Mr. Cowie and Mr. Kreider. Mr. Cowie, of the Federal Trade Commission, who called upon us a short time ago, and he and Mr. Kreider, who is our treasurer, went over our books roughly, and that report shows some figures that are about right. I did not go over the books myself, and I can not answer just what the figures are, but there is a good deal of underwear that is all wool that we have not made.

Q. And you supply a number of distributors of all-wool underwear? In other words, your product does not go to a single house?

A. No.

334 Q. Can you, from your recollection of that memorandum, which you state to have been approximately correct, give roughly the figures?

Mr. MOLLOY. I object to that. The memorandum itself will be available, and the witness has already said that he is not certain about it.

Examiner McKEAG. You can get the memorandum.

Mr. CLARK. Mr. Cowie is not here, and I can not find that memorandum.

Mr. MOLLOY. I have no objection to stipulating on the record that it has been certified by Mr. Morton's firm. I will be very glad to admit it.

Mr. CLARK. That can be put in later.

Examiner McKEAG. Even if Mr. Morton is not here?

Mr. MOLLOY. Yes; if your representative says it is such.

Mr. CLARK. It would be convenient if Mr. Morton had a recollection of what the figures were.

A. I did not go over it, and I prefer not to say something I am not sure of.

Q. Will you name some of your principal customers for all-wool underwear?

335 A. The Dr. Jaeger Sanitary Woolen System, H. Loeb & Company, A. Kuehnert & Company.

Q. From your interest in this branch of the business, have you a knowledge of the competition in all-wool underwear represented by importations?

A. No, sir; I have not.

Q. You also make mixed underwear garments?

A. Yes, we do.

Q. In respect to the labeling of boxes, are you familiar with the way in which the boxes or the garments themselves are labeled as to whether the terms "wool and cotton" are applied to the mixed goods?

A. I do not think I have ever seen a label, no matter whose it is, that has got the words "cotton and wool" on it. I have seen a great many labels called "Wool," and then other trade names such as "Merino," and so forth.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Do you spin your own yarn?

A. No, sir.

Q. In manufacturing and distributing your garments made of all wool, the fact that they are all wool is featured in the  
336 brand or advertisement or the method that you employ in bringing it to the purchasing public?

A. I can not answer that question directly, for this reason: Practically all the underwear we manufacture is sold to what are known as specialty houses who are jobbers. They use their own brands, which of course have their own terms on them. We sell very little if any underwear under our own brands.

Q. In other words, you put up the merchandise in the containers, with markings to suit the trade through which your product is distributed?

A. Yes; in accordance with their instructions.

Q. You are familiar of course with the advertisements that Dr. Jaeger's underwear has been carrying for a number of years?

A. Yes.

Q. Is it not a fact that they have always featured their garments as all-wool garments?

A. I am not familiar with those advertisements. To tell you the truth, personally, I do not pay much attention to them.

Q. In the underwear that you make, of a mixture, where cotton and wool is used in the manufacture, have you followed the same plan, of only using those brands and labels which your customers desired, or do you put on your own labels or markings?

337 A. We label them as the customers desire.

Q. Are you familiar with the brands and labels that they have requested you to put on the boxes or garments that you have manufactured for them, or that they have put on themselves?

A. I would be familiar only with those that we manufacture for them, and that of course to a greater or less extent. I do not follow every detail.

Q. Have you used trade names in marketing any of your merchandise?

A. Our own?

Q. Yes.

A. We have recently established a new line of labels within the past few months for such purpose.

Q. How long have Hanifen & Company been in the business?

A. Since about 1880, I think was the beginning.

Q. Have you been connected with the concern from its inception?

A. No.

Q. How far back does your experience go?

A. I have been in the textile industry since I was a boy; that is probably about 33 or 34 years.

Q. And in the underwear branch of the textile industry how long?

A. In the manufacturing of it, probably twenty years.

Q. And in those twenty years of experience in the underwear branch of the industry you have been familiar with the labeling and branding of underwear generally throughout the United States?

A. Yes; I think so.

Q. And has it not been a fact and a custom that in that time manufacturers making garments partly of wool and partly of cotton have labeled their merchandise as wool and worsted and natural wool, or terms similar to those?

A. I do not know what other manufacturers have been doing. That is, we see those brands, but just what such a garment is composed of I do not know, for we do not examine it—are not interested enough in it.

Q. Then your answer is that you do not know what that general custom has been?

A. I know that there has been a general custom to label them such names as you have described, but just what those garments happen to have in them, that I do not know.

Q. They would not have all wool in them?

A. There are a great many of them, and I suppose every body does not stick to the literal translation.

Q. In those garments containing all wool it has been the custom so to mark them, has it not?

A. I should not put it in that way. For instance, if we should put out a garment that was all wool, we would not use the words "All wool." We would just call it "Wool" and those that we are manufacturing for others under their own brands, they are not using any designating word as to quality.

Q. How long has that been in vogue—recently has it not, Mr. Morton?

A. I was out of the manufacturing of underwear for a short time, and I have been back again in it since July, 1919, and since then those for whom we have been doing it, to the best of my knowledge, have not been designating on their labels.

Q. Since 1919?

A. Yes.

Q. When you were previously active in the industry they were using descriptive words?

A. I do not think these present customers now, but ones that we had previously were.

Q. Are they what are called trade-mark houses that feature their products under trade names?

340 A. Yes; the ones with whom we are doing business now; they are trade-mark houses.

Q. Is it not a fact that as a rule trade-mark houses do not do that, but feature it entirely under their trade name?

A. That is true of those with whom we are doing business, but what others are doing I do not know.

Redirect examination by Mr. CLARK:

Q. You say since 1919 all-wool garments have not been marked expressly "all wool" but "wool"?

Mr. MOLLOY. No; the witness did not say that

A. No, sir; I did not mean to infer that.

By Mr. CLARK:

Q. Please state what the fact is.

A. I said that July, 1919, was the time that I went back into the underwear business, after I had been out of it for two years prior to that.

Q. For about how many years?

A. From about 1911, I think it was, until about 1919, I was out of the underwear business.

Q. Then, what was your statement as to the labeling of all-wool garments since 1919?

341 A. That those for who we have been making garments have not been branding their labels as to whether they had any wool in them or not.

Q. And for the period between 1911 and 1919 you can not say?

A. I can not say; no, sir.

Q. I think you have said in answer to the cross-examination that you supposed you understood that some persons who have used the labels which were named to you, such as "Wool" and "Natural wool" and "Natural worsted," had been using them on garments which were not all wool.

A. I believe that. I am not sure of it, because I do not know what the garments contain.

Q. From your experience and observation as a manufacturer of all-wool garments, is it your opinion that using the labels I have named, "Wool," "Natural wool," and "Natural worsted," tend to bring the mixed goods so labeled in competition with all-wool garments?

Mr. MOLLOY. I object to that as calling for a conclusion from the witness that is the subject matter for this commission to determine and not for the witness to make his conclusion on.

Examiner McKEAG. You may answer subject to the objection.

342 A. I believe that a garment should not have the word "Wool" labeled on it or on the box unless it is all wool.

Q. Why?

Mr. MOLLOY. I make the same objection.

Examiner McKEAG. Same ruling.

A. Because I would feel, if it was not all wool, that the word "Wool" on there would imply or should imply at least that it was.

Q. To the public?

A. Would imply it to anybody.

Mr. CLARK. That is all.

Mr. MOLLOY. That is all.

THOMAS E. PENDERGAST was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live?

A. At Newark, New Jersey.

Q. What is your business?

A. Buyer for Hahne & Company, hosiery.

Q. Does that include underwear?

343 A. I buy for the ladies' hosiery. Formerly I bought for the ladies' underwear, but not the gentlemen's underwear.

Q. How long have you been in that business?

A. Since 1870.

Q. Ladies' underwear generally is made of the same material as men's underwear?

A. In some cases yes, in others not. Some are lighter and not as heavy as they are in gentlemen's.

Q. But they are all wool, or wool and cotton, speaking generally?

A. Some of them are made of wool, some silk and wool, some cotton and wool, some are made of cotton.

Q. At any rate in your experience as buyer and salesman—you have been a salesman too, have you, of underwear?

A. Yes, Mr. Clark.

Q. You have become familiar with the meaning of certain terms, such as "merino" or "natural wool," and "natural worsted," and "gray wool," as applied to underwear?

A. Yes.

Q. What do you yourself understand by the term "merino"?

344 A. Well, gentlemen, I first of all gained from the manufacturer positively what the garment consisted of, and then I in turn instructed my people to sell those goods according to the information which I received; and if we were dealing with very first-class houses, such as the American Hosiery, Winship Boyd, Carl Gottman, or Parker & Company, all good reliable people, if they undertake to say that an article is silk or wool you most assuredly can rely upon them; also Cartwright & Warner's goods, which are imported.

Q. I mentioned among the terms which manufacturers use on underwear or on the boxes containing underwear the terms "merino" and "natural merino." I want to direct your attention to the question of what those terms are understood to mean, first by yourself, then in the trade, and then by the purchasing public. Will you please state what your understanding is from your experience as to the meaning of the term "merino"?

A. If Mr. Clark came in to me, and I were a salesman knowing what I do from the manufacturer, I should say to Mr. Clark: "This is merino; this is from the people from whom we bought it; and from my knowledge of it it is merino"; and I would want in all honesty to tell you exactly what it is.

Q. And when you told them that it was merino, what did you understand that they would understand as to its quality with respect to the wool or cotton in it?

345 A. Very fine wool, sir.

Q. And as to the term "natural wool"?

A. All pure wool.

Q. And "Australian wool"?

A. All pure wool.

Q. And "natural worsted"?

A. All pure wool, only harder twist.

Q. And "Gray wool"? That is one of the labels here.

A. Gray wool, that is the natural wool—all wool.

Q. And from your experience and observation of the experience of salesmen with customers where those terms are in fact applied by the manufacturer to mixed wool and cotton goods, is it your belief that they mislead the purchasers?

Mr. MOLLOY. One moment. I think you are leading a little. I object to that.

Examiner McKEAG. Are you objecting on the ground that it is leading?

Mr. MOLLOY. That it is leading and putting words into the witness's mouth.

Examiner McKEAG. Phrase your question a little differently, to remove that objection.

By Mr. CLARK:

346 Q. From your experience as a salesman and presiding over salesmen and in contact with customers, what do you understand is the impression that the purchasing public receives from the labels that you have just said you understood they understood to mean all wool?

Mr. MOLLOY. I object to that, because the witness has not stated that the labels that you mention did contain all wool.

Examiner McKEAG. Mr. Clark, you can ask that question directly, and let the witness answer without putting on the qualification.



By Mr. CLARK :

Q. From your experience, what do you understand is the impression given to the purchasing public by the label "Natural Merino"?

A. Mr. Clark, natural merino coming from a reputable firm would imply that it was all pure wool.

Q. Yes, Mr. Pendergast; but not assuming any knowledge on the part of the purchaser as to the manufacturer from whom it comes, what is your idea of the meaning that the public receives just from that term "Natural Merino"?

A. Naturally, Mr. Clark, if I tell you it is natural merino,  
347 that means "this is pure wool."

By Examiner McKEAG :

Q. What they want to know is, if you just told the public "this is a natural merino garment," what impression would they have of that without saying anything more?

A. They would believe it was a natural-wool garment.

Q. All wool, or partially wool and partially cotton?

A. All wool, sir.

By Mr. CLARK :

Q. The same question as to the term "Merino." What impression would the public get from that term?

A. That it was all wool, sir.

Q. And as to the term "natural wool"?

A. All wool.

Q. And "gray wool"?

A. Gray wool—all wool.

Q. And "Australian wool"?

A. All wool, sir.

Q. And "natural worsted"?

A. Natural worsted, all wool, harder twist.

Q. And the public in your opinion so understands?

A. I should take that as Mr. Clark's understanding if I  
348 should sell him that garment.

Cross-examination by Mr. MOLLOY :

Q. What percentage of your department's business would consist of the sale of all-wool garments as compared to underwear garments made partly of wool and partly of cotton?

A. It would be about 40 per cent wool.

Q. That is, there would be 40 per cent of all-wool garments?

A. There is really no great demand for all pure wool. A garment is the better for wearing that has a little cotton in it, but there are some people who will have nothing but pure wool, such as the Jaeger and Cartwright & Warner and others.

Q. In those garments that are made of all pure wool, is it not a fact that the garment is marked "All wool"?

A. Well, in all foreign goods you will find "all wool," and there are a few, such as Jaeger's, marked "All wool."



Q. Do you know Mr. Reis?

A. Yes; I do.

Q. He is one of the principal and one of the largest underwear distributors in the country, is he not?

A. Yes; a jobber.

349 Q. He was on the stand this morning.

A. Yes.

Q. Are you familiar with his product?

A. I am.

Q. He has testified that in the garments distributed by him, which are all wool, the stamp "all wool" is put on the garment. Has your acquaintance with his products been such that you remember that fact?

A. Yes. Now, what they call their H. H. garment, that is all wool and so stamped, but there are many of the Glastonbury products that are constituted of cotton and wool. The Glastonbury underwear is a very reliable brand of underwear of American make.

Q. And one of the reputable manufacturers?

A. Yes.

Q. From what other manufacturers do you purchase? Do you handle the Glastonbury underwear?

A. I have not handled it in fifteen or twenty years. At that time I was buying the men's goods. I have not bought men's goods in about eighteen or twenty years, but I have been familiar with the Glastonbury goods—the Glastonbury underwear for fifteen or  
350 twenty years—and also the Winsted, the Norfolk, New Brunswick, and they were reputable manufacturers; I always found them very good; the American Hosiery, the Winsted people, very good, and also the Glastonbury, in this country, very good indeed.

Q. Is it not a fact that in your acquaintance with the Glastonbury and American Hosiery and Winsted companies you have handled their products made of a mixture of cotton and wool?

A. Yes.

Q. And have you handled any all-wool products from them?

A. Only in the Glastonbury.

Q. Only in the Glastonbury?

A. Yes.

Q. And in the Glastonbury, when they sold you all-wool garments, the fact that they were all wool was indicated either on the label on the box or the garment itself?

A. It was.

Q. In the case where they sold you underwear that was made of a mixture of wool and cotton in varying percentages, they used other labels?

A. Well, Glastonbury underwear—I can not recall whether they put "cotton and wool" or "wool and cotton" upon their label  
351 or not. We bought them by the line numbers. For instance, the \$9 one would be cotton, and the \$10.50 would be a little more wool in it, and so on up to the all wool. How they would designate them on their labels, gentlemen, I can not really say positively.

Q. I read from Exhibit No. 7, which has been introduced in evidence in this proceeding, which is an advertisement of the Glastonbury underwear, and they advertise a fine worsted merino. What would you understand that term to mean in their merchandise?

A. I would define "fine worsted merino" as pure wool, and that that merino, so called, there, was twisted into a harder weave instead of a soft weave, as the merino.

Q. Would you understand there was any cotton in the mixture?

A. No.

Q. Then when you say that in buying underwear from Glastonbury when they sold you an all-wool garment it was so marked as all wool, why do you presume that the article marked by them as "merino" contained all wool?

A. I should judge that if it was marked "merino" it would be all wool.

Q. The only reason for that is that you understand the word "merino" to mean all wool?

352 A. I do.

Q. What is your understanding of the word "merino?"

A. My understanding of the word "merino" is pure wool.

Q. Did you ever hear any other definition of the word "merino"?

A. No.

Q. Was there ever any doubt in your mind about it?

A. No.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. Assuming that some manufacturers applied these terms "merino" and "natural merino" and "natural wool" and "gray wool" and "Australian wool" to garments which contain cotton varying from 20 to 80 per cent of cotton, in your opinion would the public be led into the belief by those labels that the goods were all wool?

Examiner McKEAG. We have already gone over that.

Mr. MOLLOY. I object on that ground

Examiner McKEAG. You have already gone over that on direct-examination.

Mr. CLARK. I ask to be allowed to examine the witness according to the language of the complaint, and I have not put that precise question.

353 Examiner McKEAG. You have asked him a series of questions, and from the answers there could be no other conclusion.

Mr. CLARK. I ask for a ruling on the question.

Examiner McKEAG. Under the circumstances I do not think it should be allowed.

Recross-examination by Mr. MOLLOY:

Q. You say you have purchased from the American Hosiery Company?

A. Yes.

Q. They are one of the most reliable of our manufacturers in this country?

A. In this country.

Q. And you would have confidence in any terms or expressions that they used?

A. I certainly would.

Q. Believing the meaning that they had attributed to the phrase used?

A. I would.

Q. I show you an advertisement which appeared in the New York Times of December 3, 1919, and call your attention to this paragraph and ask you to read it.

A. You mean "Merino?"

354 Q. Yes. Just read that paragraph.

A. "Merino was a term employed"—

Q. Read it to yourself, and then I will examine you on it. Now, having read that paragraph, Mr. Pendergast, having read the advertisement which I exhibited to you, do you desire to change your testimony as to what is the accepted meaning of the word "merino?"

A. Gentlemen, I have always been brought up in strict lines of honest merchandising. I have always understood candidly that "merino" consisted of pure wool.

Q. But is it not a fact, Mr. Pendergast—

Mr. CLARK. Excuse me. I do not know what Mr. Pendergast has read, and I ask that it be put in evidence if you are to examine the witness in respect to it.

Mr. MOLLOY. All right. I offer the advertisement in evidence.

Mr. CLARK. Will you be kind enough to show it to me?

Mr. MOLLOY. Certainly.

Mr. CLARK. To which paragraph did you call Mr. Pendergast's attention?

Mr. MOLLOY. To the heading of the paragraph marked "Merino."

Mr. CLARK. And you offer the advertisement in evidence?

355 Mr. MOLLOY. I offer it in evidence.

(The advertisement so offered and identified was received in evidence, marked "Exhibit 8," offered by respondent, and is forwarded herewith.)

The WITNESS. I will say that the Winsted firm is a very good firm. I have always found it so.

By Mr. MOLLOY:

Q. Did you ever hear the definition of the word "merino" as used by the American Hosiery Company in the advertisement that I have just submitted to you, before now?

A. I can not recall that I ever have, but I would say that if the American Hosiery people put out an assertion such as that they undoubtedly are very reliable indeed, and I would be very much pleased to accept any assertion that they would make.

Q. In other words, that there may be some doubt in your own mind as to the correct meaning of the word "merino" as indicating an all wool garment?

A. That is it exactly.

Q. In other words, that you may be wrong, and they may be right?

A. Quite so.

Redirect examination by Mr. CLARK:

356 Q. I call your attention to the statement here that the American Hosiery Company is inserting this advertisement to acquaint you with its definition of its trade terms, the word "its" being italicized. So that in your opinion, after you have read portions of this advertisement Exhibit 8, it does not affect your opinion as to the use of the terms we have discussed, except as to the American Hosiery Company's understanding of them?

A. I would be very much pleased to be guided by the opinion of the American Hosiery people.

Q. As to its terms?

A. Yes, as to its terms.

Mr. CLARK. That is all.

Recross-examination by Mr. MOLLOY:

Q. The standing of the American Hosiery Company is such, in your opinion, that they would not attempt to describe or define a meaning to a word other than the accepted meaning of that term?

A. I have been dealing with the American Hosiery Company off and on for close onto 30 years, and have always found Mr. Tal-

357 cott and all his representatives absolutely and positively honest. Their aim, if I may make the remark, gentlemen, was to create an industry in this country where they could become the best factories in the manufacture of underwear, and not alone to supply the people of this country but also to become largely exporters.

Mr. CLARK. I suggest that this is encumbering the record.

Mr. MOLLOY. I think Mr. Pendergast wants to express his opinion. I should like to hear it.

A. If we had more manufacturers in this country such as the American Hosiery and the Old Norfolk-New Brunswick people and the Winsted people, all reliable manufacturers, I can assure you, gentlemen, that you would have a very, very great export trade. Of course, there are a great many goods made in this country to-day, gentlemen, and they are made up good, and the following year a gentleman from South America or somewhere else comes in, and there is a little trickery going on, and the next year he does not get the same thing. Now, if we can standardize our brands, such as Cartwright & Warner in England, Epps's Cocoa, Lea & Perrin's sauce, and Colman's mustard, and the Irish friezes, and do that sort of standardizing in general, we will go far toward becoming one of the greatest exporting nations in the world. There is no question about it.

358 By Mr. CLARK:

Q. Mr. Pendergast, don't you think that in the carrying out of that standardizing it would be well in your opinion to specify in the case of wool and cotton goods that they do contain wool and cotton?

Mr. MOLLOY. I object to the question. That is entirely the province of the commission.

Examiner McKEAG. He may answer subject to your objection.

A. Yes.

CARL G. ANDERSON was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Buyer of men's furnishings for Best & Company.

Q. Where?

A. Fifth Avenue and 35th Street.

Q. That includes underwear?

A. Men's furnishings, also men's underwear.

Q. Have you had experience as a salesman prior to being buyer?

A. Yes.

Q. About how many years?

359 A. I have been connected with the furnishing trade for fifteen years.

Q. As salesman?

A. As salesman, assistant buyer, and buyer.

Q. And in that time you have dealt personally with customers who have bought underwear, and have had the supervision of salesmen of underwear?

A. Right.

Q. And you have become familiar with some of the labels or brands which American manufacturers place on the containers of their underwear, such as "Merino" and "Natural merino" and "Natural wool" and "Natural worsted" and "Gray wool" and "Australian wool?"

A. I am familiar with that classification, as trade terms.

Q. Will you state from your experience what you understand the public understands by the label "Merino" as applied to underwear?

Mr. MOLLOY. One moment. I think he ought to get the opinion of the witness first, and then his impression from the public.

Examiner McKEAG. You mean separately?

Mr. MOLLOY. Yes; and lay the basis, from his own understanding, to the understanding of the public.

360 Mr. CLARK. I am not interested in his understanding. I want to know what the public understand.

Examiner McKEAG. You may answer the question.

A. The chances are that the general public when they come in and ask for a garment called "Merino" feel that they are asking for an all-wool garment, a garment containing all wool.

Q. What do you understand is their impression as to the term "Natural merino?"

A. "Natural" gives the significance of shade.

Q. But all wool?

A. No, sir; just simply applying to the color, that is of natural wool.

Q. "Natural wool?"

A. Applying to the shade, being that it is a gray garment, and that the classification is between the white and the gray.

Q. But made of wool?

A. Made of wool, of course.

Q. And the term "Natural wool," what is their understanding of the composition of garments so labeled?

A. Natural wool?"

Q. Yes.

A. The shade.

Q. That is the shade of the wool?

361 A. Classification of the shade entirely. That is all they practically know. If they come in for a garment and they ask for "Natural wool," it is the clerk's policy to know it is a gray garment, and then the technical part, what it contains of wool, that is given out as they ask, an all-wool garment or wool and cotton, or whatever the classification is.

Q. Then as to the label "Australian wool," when a customer sees a box labeled "Australian wool," what do you understand his impression is as to the make-up of that garment as relates to its contents?

A. From the general source of the wool coming from Australia.

Q. And all wool?

A. And all wool. That is the significance attached to it, that is in the ordinary mind of the public. Of course, in my experience there have been but two garments that I handled and sold in my career that were marked "Australian" that I ever recall.

Q. Do you handle some all-wool underwear?

A. We do.

Q. Both domestic and imported?

A. Yes. Not the domestic at present. We are not handling any domestic at present.

362 Q. Best & Company at present import their all-wool garments?

A. They have a number of that character.

Q. Can you name the manufacturers from whom they import them?

A. Since I have taken hold of this department, the Cardinal Wolseley brand. That is all I know of.

Q. How are they marked on the garment or box?

A. They come in bundles with a wrapper on it.

Q. Is there any label on the wrapper?

A. The lot number and size and classification.

Q. Any descriptive term as to the wool?

A. "All wool," yes. The garment is marked that.

Q. The garment is marked "All wool" ?

A. Yes.

Q. In the past have you handled domestic all-wool underwear?

A. Do you mean marked "All wool"—all-wool garments?

Q. Actually all wool.

A. I never handled it. I know a couple of numbers that are manufactured by a certain concern that are all wool—all worsted.

Q. Are you familiar with the labeling of those domestic all-wool garments?

A. No, sir; I am not.

363 Q. What do you understand by the term "Worsted" is distinguished from wool?

A. A harder twist of yarn, just the same relation as of lisle to cotton—a harder twist.

Q. And worsted to wool?

A. "Wool" being all wool.

Q. And you understand that a garment labeled "Worsted" or "Natural worsted" means a garment knit of all-wool yarns?

A. No; I do not consider that. "Natural" I apply to shade mostly, and I think that is the general opinion of everyone, "Natural" being entirely in reference to shade; and then the classification of "Worsted" I apply to an all-wool garment.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. You say that the only all-wool garments that you have purchased to sell in your department are those that you import?

A. That is the only one I have at present. Heretofore in my past experience I have handled an all-wool garment.

Q. Is it not a fact that the domestic all-wool garment is marked indicative of the fact that it is all wool, just the same as the foreign merchandise?

364 A. Of the domestic—I never saw it.

Q. What percentage would your all-wool business be in comparison to your mixed goods?

A. Why, that is hard to draw a line. I could give an estimated amount.

Q. Would it be five per cent? In other words, would you sell five per cent of wool garments to 95 per cent of others?

A. That would be about the proportion.

Q. So that the other garments are made of a mixture of cotton and wool?

A. Containing wool and cotton, and silk and wool, classifications of that sort, or all cotton.

Q. Do you buy from the American Hosiery Company?

A. We have. I have not bought from them in my present position.

Q. Have you bought from the Winsted Hosiery Company?

A. No, sir.

Q. Have you bought from Glastonbury?



A. No, sir.

Q. What American houses have you bought from?

A. At present?

Q. During your experience.

365 A. In my career I have bought from Kuehnert, and other domestic houses.

Q. What others?

A. Robert Reis. I have also bought from the American Hosiery, in my old place.

Q. You are familiar with the packages and merchandise of the American Hosiery Company?

A. Familiar in the sense of lot numbers and sizes and general brands, the matter that goes on the boxes.

Q. And in their descriptive terms that they have used in distributing their merchandise, but you never bought any all-wool merchandise from the American Hosiery Company?

A. I never bought it, but I know of a garment that they handle that is all worsted.

Q. When the American Hosiery Company, for instance, calls a garment a "Merino" garment, what do you understand that to mean?

A. They simply use that as a trade term, I expect. When we bought or sold a garment with the word "Merino" on it, it was not bought or sold as an all-wool garment.

Q. And when you purchased it and received from them a garment termed "Merino," you understood that you were buying and receiving a garment made of a mixture of cotton and wool?

366 A. Exactly.

Q. And you sold it as such?

A. Yes; I represented it in my old place, and am educating the sales people to represent it at present on that basis.

Q. And in selling your merchandise, is it not a fact that all the merchandise is taken out of the original container and put in racks or separate boxes of Best & Company?

A. In our stock rooms we let it remain in our original container, but when it is brought to the floor it is put on shelves or in drawers and the like. It is removed from the box.

Q. It is removed from the manufacturer's box?

A. Yes.

Q. So that the manufacturer's branding or labeling bear no part in the presentation to the customer of the article that you purchase from that manufacturer?

A. Other than the stamping that is on the garment.

Q. What stamping is on a garment made of a mixture of cotton and wool?

A. None on the domestic. I am referring to the American Hosiery Company. Their garments have been stamped "Super Merino" or "Merino," and like that.

Q. And when so marked, your salesmen understood it to mean a garment made of a mixture of cotton and wool?

367



A. Exactly.

Q. And it was so offered to the customer as such?

A. To our best knowledge it was. It was so represented to our clerks. Of course in the dry-goods houses at present there is a different class of help. We get men from the different departments where they succeed in business, and they are brought into these different departments and tried to be educated not to misrepresent the quality of the goods. That is the policy of the house I am employed by and that has been my past experience.

Q. Is not that the policy of every department of your house?

A. Yes.

Q. In other words, the policy of Best & Company, as one of the leading stores in the city, is to educate its salesmen to know the product that they are offering to the customer so that there can not be any misrepresentation?

A. With a fair amount of intelligence, but I do not believe it could be done.

Q. So that when you offer this merchandise, say of the American Hosiery Company marked "Merino" or "Super merino," you  
368 understood it to mean a garment made of a mixture of cotton and wool?

A. Exactly.

Q. And it was so represented?

A. So represented and sold as such, in my experience in personally selling, the super, of course, being a garment of more wool, was the term that I would apply.

Q. Have you ever had occasion when anyone who came into your store as a customer questioned the fact that the merino garment did contain a mixture of cotton and wool?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. And of course if an occasion of that kind happened, you would have remembered it?

A. I think I would. I think I would have corrected a man's viewpoint on merino, because that has been the education in my training, is the representing of merchandise on its merits.

Q. In other words, if in your silver department a clerk was selling "Sheffield plate" the salesman would not tell the customer that it necessarily came from Sheffield, England, would he?

A. I don't know how that could apply. I do not believe so.

369 Q. You know that the so-called Sheffield plate that is bought and sold is a type of silverware that originated from being manufactured at Sheffield, England?

A. Well, that is a different class of merchandise.

Q. In other words, there are words that primarily have a historic meaning; that by usage acquire a secondary meaning; that perhaps everyone speaking the English language does not understand, but

to remove that ambiguity your salesman would be instructed to enlighten the customers?

A. We always try that method to represent the merchandise such as it is.

Q. And any phrase that the child in the street did not understand, perhaps through a lack of a broader intelligence of the English language, why, you would acquaint them with that fact?

A. We would make that effort if I could, if I was in that locality. Mr. MOLLOY. Exactly. That is all.

Redirect examination by Mr. CLARK:

Q. And your instructions to your salesmen would be with a view to correcting the understanding of the public, contrary  
370 to the understanding of the trade as to those labels?

A. Not the labels.

Mr. MOLLOY. I object to that, because there is no evidence here that the instructions were given to correct the customer.

Examiner McKEAG. Read the question.

(The stenographer read the question as follows:)

“Q. And your instructions to your salesmen would be with a view to correcting the understanding of the public, contrary to the understanding of the trade as to those labels?”

A. Not the labels, the garments. We are not selling labels. We are selling merchandise.

Q. That is the occasion for your instructing your salesmen, as you say, that certain goods contain cotton and wool, is that the customer may not get the impression that they are all wool?

A. Exactly.

Mr. CLARK. That is all.

Recross-examination by Mr. MOLLOY:

Q. The instruction is to tell your customer what the merchandise is. Is not that the fact?

371 A. That is my opinion, and that is the way we have tried, to weigh the garment itself, in selling across the counter.

Q. In other words, you do not presume that the customer does not know what he is buying when he asks for a garment of a particular fabric. In other words, you do not presume the ignorance of your customer?

A. We give perhaps 75 per cent the benefit of the doubt, as to the customer's viewpoint on some garment when he comes in and asks for a garment of such a character, that when he asks for an all-wool garment, or silk and wool, that he knows what he is asking for, and we show it, and we do not try to show anything else.

Q. And if they do not ask, the part of the salesman is to tell the purchaser what the garment is?

A. If there is any particular merit attached to the garment, it is his duty to show that.

Q. And that is the part of general salesmanship, isn't it?

A. I believe that is the education we have been brought up to, along those lines. I would classify it as good salesmanship.

Q. I am only speaking of good salesmanship.

A. Yes.

372 Q. From your experience with salesmen, Mr. Anderson, was there ever an occasion for you to obtain an impression that anyone in asking for a merino garment expected to get any garment other than a garment made of a mixture of cotton and wool?

A. Well, no; I don't think I could answer that other than giving my opinion. I feel that the average man that came into a store—

Mr. MOLLOY. I object to that.

Mr. CLARK. I ask that the witness be allowed to answer the question.

Mr. MOLLOY. Let him answer yes or no.

Examiner McKEAG. He may answer Mr. Molloy's question yes or no, subject to further examination by Mr. Clark on that point if he desires.

Mr. MOLLOY. Read the question.

(The stenographer read the question as follows:)

"Q. From your experience with salesmen, Mr. Anderson, was there ever an occasion for you to obtain an impression that anyone in asking for a merino garment expected to get any garment other than a garment made of a mixture of cotton and wool?"

By Examiner McKEAG:

Q. Answer yes or no if you can.

373 A. I don't think I can. I want to know what an impression is.

Mr. CLARK. I ask that the witness answer the question in his own way.

A. I don't know whether you want the impression of the individual customer or the impression of the clerk.

By Mr. MOLLOY:

Q. During your experience as a salesman and buyer, familiar with the department, did you ever experience an occasion when a customer stated, in asking for a merino garment, that he expected to get an all-wool garment?

A. My impression on that would be no.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

HARRY C. BUTEUX was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Assistant buyer for Brown Durell & Company.

Q. Where are they located?

A. 11 West Nineteenth Street.

Q. What is their business?

374 A. Jobbers.

Q. In what line?

A. Underwear and hosiery.

Q. Do they handle the product of the New England Knitting Mills?

A. They handle some of the numbers; yes.

Q. Have Brown Durell & Company recently requested the New England Knitting Mills to adopt a different label on the goods prepared for Brown Durell & Company than "merino?"

MR. MOLLOY. I object to that on the ground that what Brown Durell & Company may have requested manufacturers of underwear to do has no bearing on the issues in this case.

MR. CLARK. I submit that it shows, according to what he may answer, whether or not a certain brand of underwear was sold to distributors under other labels than "merino"—cotton and wool.

Examiner McKEAG. The witness may answer your question subject to Mr. Molloy's objection. If I were passing on the evidence, I should have my own opinion about it, but he may answer subject to your objection.

MR. CLARK. I will put the question a little differently.

375 Q. How is the underwear which Brown Durell & Company purchased from the New England Knitting Mills labeled at present?

A. Where a garment contains part wool, we mark it "cotton and wool." You must remember that we are a very small factor in the men's underwear business—very small.

Q. You distribute that particular line of underwear made by the New England Knitting Mills to various retailers?

A. Yes.

Q. How was that line of garments heretofore labeled?

A. It was only labeled the way we asked them to label it.

Q. How did you previously to the labeling as cotton and wool have it labeled?

A. We had it labeled sometimes "part wool" and sometimes "merino."

Q. And that line of goods was distributed under the label "merino" as well as "cotton and wool" heretofore by you?

A. Not "cotton and wool" but "part wool" or "merino."

Q. "Part wool" or "merino?"

A. Yes.

Q. Have you had any expression from retailers to whom this line of goods went, labeled "cotton and wool," according to your recent policy, as to their view of the change from "merino" to "cotton and wool?"

376 A. We have had very few, from only the smaller people. The smaller retailers simply asked us why—

Mr. MALLOY. One moment. I object to the witness testifying as to what they say. I have no objection to the fact of his having communication with them.

By Mr. CLARK:

Q. In what way did those expressions come to you—in letters?

A. No; through people coming into the store, very few. It was a small number.

Q. What did any of them state to you?

Mr. MOLLOY. I object to that as the rankest hearsay, and encumbering this record with evidence that is inadmissible and irrelevant according to all the rules of law laid down for a proceeding of this kind. This is either a proceeding conducted under proper legal limits or it is nothing more than an excursion into the wildest realm, to suit the fancy of the commission and the counsel conducting the hearing.

Mr. CLARK. If the examiner please, notwithstanding counsel's strong language, I submit that this is a line of testimony which is approved by the highest authorities, including the United States Supreme Court. I refer them to the case of Lawler vs. Lowe, 377 the Danbury Hatters case. Of course if it is objectionable, incompetent, hearsay, or on any other ground, his exception will protect him.

Examiner McKEAG: In view of that statement, Mr. Clark, I will permit the witness to answer the question subject to counsel's objection.

A. The only statement they made, they asked why we had made the change in the labeling of the goods. I explained to them why we did it, simply that we had marked it "Merino" or "Part wool," and now we had marked all our goods, ladies', children's, and men's, where they contained a percentage of wool, marked them "Cotton and wool."

Q. Did they say anything as to the effect on their sales?

A. No, sir; they did not.

Q. Do you handle any all-wool underwear?

A. No, sir.

Cross examination by Mr. MOLLOY:

Q. In your position as assistant buyer for Brown Durell & Company you have handled the product of the Winsted Hosiery Company?

A. Not the Winsted Hosiery Company, the New England Hosiery Company.

378 Q. Of the New England Knitting Company?

A. Yes.

Q. And you have purchased from them numbers marked "Merino"?

A. You are speaking of the past?

Q. Of the past.

A. Yes.

Q. When you purchased those articles you understood that you were getting a garment made of a mixture of cotton and wool, did you not?

A. Yes, we did.

Q. You sold them as such?

A. We did.

Q. And the customers who bought them from you understood them to be a mixture of cotton and wool?

A. I always understood it that way.

Q. Is it not a fact that it has always been understood as far as your experience goes at least that the use of the word "Merino" has been to indicate an underwear made of a mixture of cotton and wool?

A. That has always been my understanding.

Q. Did you ever hear any question raised as to the fact?

A. I don't believe I ever did.

379 Q. How recently has this change taken place from the marking of your merchandise from "Merino" to "cotton and wool"?

A. This year for the first time.

Q. You have heard of this proceeding brought against the Winsted Hosiery Company by the Federal Trade Commission?

A. I have heard some little of it.

Q. Isn't it a fact that that is the occasion for your house requesting that the words "cotton and wool" be used where there is a mixture, rather than to run into the face of the criticism brought about by this proceeding?

A. Indirectly, yes.

Mr. MOLLOY. That is all.

FRANK E. RANSON, was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Manager of the New York Service Station of the Munsing Wear Corporation.

Q. What do they manufacture?

A. Munsing Wear, otherwise underwear.

Q. Where are they located?

380 A. Minneapolis, Minn.

Q. And where is your office?

A. 334 Fourth Avenue, New York City.

Q. Does Munsing manufacture any all-wool underwear?

A. No, sir.

Q. It manufactures only mixed cotton and wool goods?

A. It manufactures cotton, mixed cotton and wool, and mixed cotton, silk and wool, fibre silk and wool.

Q. You are familiar, as a competitor of other underwear manufacturers, with some of the labels which have been used by them on mixed underwear?

A. No, sir; I am not.

Q. How do you label your underwear?

A. Just the number and the style.

Q. With no words descriptive of the contents?

A. No, sir. The component parts are not named.

Q. How long has that been your practice?

A. Always as far as I know.

Q. Over how many years?

A. I can only speak for myself, of four years duration, but have never known any of the goods of the factory, since they have been in existence, to be marked.

Q. Suppose underwear garments made of cotton and wool  
381 are labeled by the manufacturer on the boxes in which they are delivered "Merino," and "natural Merino," and "natural wool," and "Australian wool," bearing in mind that the garments contain cotton as well as wool, what in your opinion is the effect of those labels on the purchasing public?

Mr. MOLLOY. I object, because the witness has not been qualified to speak for what effect it would have on the general purchasing public.

By Mr. CLARK:

Q. Let me ask this: What controlled your policy in labeling your goods only with numbers and not with descriptive words?

A. Why, I don't know as there has been any policy, strictly speaking, but they have always done that from the time they started, from what knowledge I have. My knowledge, as I said, only goes back four years personally, but previous to that I have known of the company a good many years, for twenty or twenty-two years, and I never in my life have seen any of their boxes marked with any of the component parts on the box.

Q. Do you know as a fact that other manufacturers do label their mixed cotton and wool underwear with descriptive terms?

A. That is only hearsay knowledge to me. I could not say  
382 that I positively have ever seen any, because I have not had much to do with the underwear business previous to the present four years, have had nothing to do with it previous to the present four years, and these last four years I have been right down in my own office and not out of it.

Q. You are not familiar with the manufacture of underwear?

A. No.

Cross-examination by Mr. MOLLOY:

Q. In the marking of your product as Munsing Wear, those two words are used in marking underwear made of all cotton. Is not that the fact?

A. Yes.

Q. Of wool and cotton?

A. Yes.



Q. Wool and cotton in varying percentages?

A. Yes.

Q. And the percentages of wool and cotton in your finished garment vary according to the varying demands of the trade that you serve, do they not?

A. According to price.

Q. According to price?

A. Yes.

383 Q. What would you say is the range of percentage of wool from its lowest content to its highest content?

A. We, none of us know.

Q. Do you make an all-wool garment?

A. No, sir.

Mr. MOLLOY. That is all.

(Whereupon, at 12.30 o'clock p. m., on November 17, 1920, the further hearing of this case was adjourned until November 18, 1920, at 10 o'clock a. m.)

384 Federal Trade Commission.

FEDERAL TRADE COMMISSION	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY.	

386 NEW YORK, N. Y., November 18, 1920.—10 a. m.

Met pursuant to adjournment.

Appearances: The same as yesterday.

DAVID J. MOSES was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Manager of the Chain Shirt Shops.

Q. Where?

A. Now located at 494 Broadway.

Q. You deal in underwear, I presume?

A. Yes; we sell underwear at retail.

Q. You are manager there?

A. Yes.

Q. Have you had any experience as a salesman in the handling of underwear?

387 A. Yes.

Q. How many years?

A. I have been in the business fifteen years.

Q. And in that time you have become familiar with the brands used by American manufacturers on mixed cotton and wool underwear, such as "Natural merino," "Merino," "Natural wool," and "Gray wool" and "Australian wool"?



A. Yes.

Q. You have also had contact with the purchasing public?

A. Yes.

Q. As to their impressions from such labels?

A. Yes.

Q. Will you state what in your opinion is the understanding of the general public as to the term "Natural wool" when they see it on a label?

A. In buying an article with such a label on it it would impress them that it would mean a pure-wool garment.

Q. How about the term "Gray wool"?

A. Also giving the color of the wool, and giving the impression that the garment was all wool.

Q. And how about "Natural merino"?

388 A. "Natural merino" is a mixture. You take the majority of the public, they would ask the salesman if it was pure wool. If the salesman said "yes," they would take that impression from the label, that it was a pure-wool garment.

Q. As to the term "Australian wool," what would they understand?

A. They would say from that that the garment was made or manufactured in Australia, and being a pure-wool garment, having that label on it, "Australian wool."

Q. And the term "Merino" alone, would they understand from that—

Mr. MOLLOY. I object to suggesting the answer.

Examiner MCKAIG. Let the witness answer.

By Mr. CLARK:

Q. What would the public in your judgment understand by the term "Merino" on the box?

A. The public coming in, buying a garment marked "Merino," they naturally will ask the salesman whether it is pure wool, and if the salesman says it is pure wool, whether he knows the difference or not, if he misrepresents it himself, it is the customer that is liable  
389 to fall for the article as a pure-wool garment. When the customer sees a garment marked "Merino," "Natural wool," or "Australian wool," or anything else, he will take it for that term. He will take it as the salesman sells it to him.

Q. You handle some lines of American underwear, I take it?

A. Yes.

Q. What lines, principally?

A. In this particular store we handle Robert Reis's underwear and Superior underwear.

Q. Are they marked with any description of the wool or cotton contents?

A. Robert Reis puts out a garment that is marked "Worsted," and supposed to be a pure-worsted garment.

Q. So far as you know, is it?

A. As far as I know; yes. I do not profess to be a connoisseur on the article.

Q. But on the other lines of mixed-cotton-and-wool garments is there any descriptive label?

A. Not from Robert Reis; no. The pure worsted is marked, and some of the garments are marked "Robert Reis & Company."

390 Q. Is that true of other lines you handle?

A. Yes; other lines in the same way. At the present we are handling an article of the Superior underwear, manufactured by Superior, but it is our label, the Chain Shirt Shops; no description on it whether it is pure wool or what it is.

Q. From your experience, then, is it your opinion that the labels "Merino," "Natural merino," and "Natural wool" in the hands of salesmen who are not scrupulous as to whether they misrepresent, may be used to deceive the public into thinking that a mixed cotton and wool garment is all wool?

A. That is up to the salesman himself. If the customer seems to be somewhat ignorant, and he asks the salesman, and he is anxious to make a sale, he had just as lief say "It is pure wool," to deceive the customer, whether the label is there or not, and the label on there helps the salesman to get away with it.

Cross-examination by Mr. MOLLOY:

Q. You have had fifteen years' experience in underwear and gentlemen's furnishings?

391 A. In underwear and gentlemen's furnishings.

Q. And during those years of your experience have you ever heard anyone express a doubt that the word "Merino" means a garment manufactured of a mixture of cotton and wool?

A. Yes.

Q. You have never heard of it?

A. I have. That is the customer's impression, that "Merino" would mean a mixture of cotton and wool.

Q. That is, the customer's impression would be that it is a mixture of cotton and wool?

A. Yes. He would naturally ask you whether it is pure wool, and sometimes doubt you in regard to it, in saying that it is a mixture of cotton and wool.

Q. The salesmen in your stores would tell them that an article marked "Merino" was a garment made of a mixture of cotton and wool?

A. Cotton and wool.

Q. And in buying underwear marked "Merino" during your experience of fifteen years, you have always understood that the article that you were receiving from the manufacturer was a garment made of a mixture of cotton and wool?

392 A. Cotton and wool; yes.

Q. How many stores does your company operate in the city of New York?

A. In the city of New York, I think, thirty-eight, and about sixty-odd all over the country.

FRANK S. TURNBULL was called as a witness, and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Please state your business.

A. President of the Rogers Peet Company, clothiers and furnishers.

Q. How long have you been connected with that trade generally?

A. Since 1887—thirty-three years.

Q. Will you state in what capacities—not so much officially as your experience in connection with the sale of underwear?

A. I went there as a stenographer, and within a year I was  
393 in the examining department of cloth, examining the cloth.

Then I made a study of textiles. I spent my vacations at woolen mills, and after I was there about five years became an assistant buyer and then buyer. I have been a woolen buyer for the concern for twenty or more years.

Q. From your education in the subject of textiles state whether the term "Merino" properly indicates wool?

A. Undoubtedly it indicates wool.

Q. Will you state on what you base that opinion as to the origin of the term?

A. The origin of the term was from the merino sheep. If I buy cloth and they tell me it is made of merino wool, or merino, they do not have to say wool. I know it is from the merino sheep.

Q. Just as in the case of Australian wool?

A. Absolutely. It can not be anything else.

Q. And do you know that in the wool trade there is a distinct quality of fleece known as merino?

A. Yes.

Q. Is that at present a grade corresponding to the original merino wool, or is there, if you know, a merino sheep to-day?

394 Mr. MOLLOY. The witness has not testified that he knows what the character of merino wool is, and how can you draw from him the comparison as requested in your question?

By Mr. CLARK:

Q. I will lay the foundation for my question. Do you know the quality of the wool distinguished as merino wool?

A. Yes; it is a fine quality. It has a high shrinkage test. That is, it shrinks considerably. It is a very high quality.

Q. By "fine" do you mean small in the fibre?

A. No; a long texture. It may be a long staple, but it has fine serrations, high shrinkage in the fibre.

Q. By "serrations," you mean the intervals?

A. The Merino sheep is the origin. The merino sheep gives the name to the wool. Now, a man may say it might be Australian, and still be merino.

Q. Because there are Australian merino sheep?

A. "Merino"—it is the blood of the fine wool.

Q. So the term "Merino" means wool?

395 A. "Merino" can not be anything else except wool. It can not be chewing gum.

Q. Am I right in understanding you to say that it is wool of a fine quality?

A. Yes; of a fine quality.

Q. Now, please tell us what "Worsted" indicates?

A. "Worsted" indicates wool that has been combed, differing from the ordinary term "Wool" or "Cheviot." A worsted has been combed and gone through a combing machine. It is wool. It must be wool. It can not be anything else, but it is wool that has been combed and not carded.

Q. By combing you refer to the process by which the shorter fibres are removed?

A. Combing and spinning makes wool worsted.

Q. Tell us by what effect.

A. It gets the wool fibres long, and then the spinning twists them. Now, when they make a woolen yarn they put it in a carding machine. The best explanation is the way you roll your own tobacco. You roll it this way [illustrating] and when wool is treated in that way we call it a yarn. That is wool, but if you comb those strands and twist them, that makes worsted.

396 Q. All wool goes through a carding process, does it?

A. Worsted does not go through a carding process, but wool does. This suit I have got on is a woolen cloth. I can not see very far, but I think the suit worn by that gentleman over there is a worsted suit, but I am not sure. This man sitting by my side here has a serge suit. They are both wool. This wool could have been a worsted if it had been combed, because it is a fine quality, good quality that will stand twisting.

Q. In your experience in the various capacities which you have mentioned you have become more or less familiar, I presume, with the labels under which American manufacturers put out their underwear?

A. Yes.

Q. Such terms as "Merino" and "Natural merino"?

A. And worsted.

Q. And worsted, and natural wool.

A. Yes.

Q. And Australian?

A. Yes.

397 Q. I ask you from your experience what, in your opinion, is the understanding of the public of the term "Merino" as so applied by manufacturers?

A. Well, the understanding—

Mr. MOLLOY. One moment. In asking the witness's experience and contact with the public I do not think there has been sufficient basis laid for the question at this stage, and therefore I object to it.

By Mr. CLARK:

Q. You have had occasion——

Mr. MOLLOY. Just ask him what his experience has been. Do not put the answer into the mouth of the witness.

By Mr. CLARK:

Q. What has been your experience in relation to the public's impression of these terms?

By Mr. MOLLOY:

Q. In the underwear business, Mr. Turnbull?

A. Of course I have not sold the stuff on the floor myself, but complaints are made to me. We have a defined policy that we will not misrepresent anything. Our own manufacturers we have no fear of, but other manufacturers we scrutinize very carefully, that what they say is exactly what the public may have in mind. We do not wish to deceive the public, and I give instructions that  
398 boxes that were labeled "Australian wool underwear" when they were not Australian should not be used in our store, because complaints would come to me. I merchandise the stock as well as buy, and complaints come to me that people have gone out of our store because we had instructed the salesmen to tell exactly the component parts of underwear, and have bought identically the same goods elsewhere because they were said to be all wool.

Q. Do you recall any particular instance?

A. No; I can not recall definite instances at all.

Q. But that experience related to a number of goods and labels?

A. It relates to the underwear just now. I do not want to bring in anything that is not germane to this case. I do not want to bring in other people's names. There are some other things, other than underwear that we have changed. I am frank to say that.

Q. Have you had occasion to change the use of the label "merino"?

A. Yes.

Q. Will you state what was the reason?

399 Mr. MOLLOY. Just one moment. I object to that unless the answer is limited to a time prior to about three years ago as being outside the issues of this case.

By Mr. CLARK:

Q. When did you make the change with respect to the use of the word "merino"?

A. Oh, several years ago. I can not give a definite date.

By Examiner McKAIG:

Q. Was it more than three years ago?

A. I can not recall. I would not say.

Mr. MOLLOY. Then I object to this witness testifying in answer to that question, unless he can limit it to a period prior to the commencement of this proceeding.

Mr. CLARK. I do not think that is any objection to this question.

Examiner McKAIG. It is not an objection in itself.

A. I know it is more than three years ago that we made the change.

Mr. CLARK. That answers the question. He says it was more than three years ago.

A. It is more than three years ago that we made the change.

400 Q. Will you give the reasons which actuated you in making the change?

A. We found we had to. We had to instruct our salesmen. Some of more experience than others may have known that merino is not all wool, but we instructed our salesmen what "merino" meant, and "Australian wool" and these other terms; that they did not mean all wool, so we took the boxes that came from the manufacturers and put the garments in our own boxes that had no marks. Now, undoubtedly there are a few people in the public who have bought underwear for years who may understand it, but the average and the vast bulk of them do not, and that is why we took this precaution.

Mr. MOLLOY. I move to strike out that last answer of the witness because his testimony already shows that he has not had experience in coming in contact with the purchasing public, and therefore is in no position to state what is the impression of the average customer in buying.

Examiner McKAIG. It may stand subject to the motion.

By Mr. CLARK:

Q. You have stated that you have merchandised these goods—underwear?

401 Yes.

Q. As well as purchased textiles?

A. Yes.

Q. And in that connection you do come in contact with the sales departments?

A. I come in contact with all the sales departments and the buyers.

Q. And have supervision of the salesmen?

A. Yes.

Q. The complaints that come are transmitted to you?

A. Complaints that come are transmitted to me, are brought to me.

Q. Complaints of customers?

A. Complaints of customers; yes. We are very careful about it.

Q. In order to make the matter brief, this statement of yours as to your abandonment of the use of the term "Merino" applies also to such labels as "Natural wool," "Gray wool," and "Australian wool"?

A. Yes; if they are not absolutely all wool, it applies to all of them.

Q. Do you, as a fact, handle any all-wool underwear?

402 A. I think we do; yes. We have one line of all-wool underwear.

Q. And how is that labeled?

A. "All wool."

Q. Do you know the manufacturer?

A. No; I do not.

Q. You have made a study of the different grades of wool, have you not?

A. Yes; I had to.

Q. And of cloths which are composed either of all wool or of wool and cotton?

A. Yes; and we do not go by our judgment on that, even from the most reliable manufacturer. Speaking of cloths, we make a test of everything that is delivered to us.

By Examiner McKaig:

Q. Do you mean a chemical test?

A. A chemical test, in order to be sure that we are getting exactly what is represented to us.

By Mr. Clark:

Q. That is, you have a laboratory of your own?

A. Yes.

403 Q. In the case of underwear are you able to determine by inspection or by your senses the proportion of wool and cotton in any given garment?

A. No, you could not determine the proportions. A man who was accustomed to it could determine by his senses whether there was wool in it, but the exact proportion he could not determine without a chemical analysis.

Q. In your experience has the term "merino" been applied to a wide range as to the proportion of wool in garments so labeled?

A. I do not quite catch your question.

Q. There has been some testimony that "merino" has been used as a label on garments which contained as little I think as ten per cent of wool.

A. Do you mean underwear?

Q. Underwear, and also on underwear that contained as much as eighty or ninety per cent of wool. I want to ask you if you have any knowledge as to the range in the use of that term as applied to underwear?

A. No, only in a general way. I could only testify to what we have.

Mr. Clark. I think that is all.

404 Cross-examination by Mr. Molloy:

Q. The use of the word "merino" in connection with underwear has always meant to you a mixture of cotton and wool, has it not?

A. It meant to me a mixture of cotton and wool when we come to analyze it and buy it; yes.



Q. In other words, when you buy merino underwear from the manufacturer you expect to receive from him a garment made of a mixture of cotton and wool?

A. As a buyer we do; yes.

Q. And a manufacturer in selling garments with that brand or number, he would expect to deliver to you a garment made of a mixture of cotton and wool?

A. I do not know as to that. I know I would expect, from the underwear trade generally, if he said "merino" we would expect a garment composed of wool and cotton.

Q. You would not expect a garment made of 100 per cent of merino wool from merino sheep, if an article was sold to you under a number or brand of merino underwear?

A. Yes, if we did not know that it was a trade custom of the underwear people to label their garments with terms of that kind. If we were going to someone else, and wanted to buy another garment of any kind, we would expect that they were giving us what they said it was.

Q. Have you ever bought any merino wool?

A. No, we do not buy wool.

Q. Have you even seen any merino wool, wool from a merino sheep, quoted in the market?

A. No, sir.

Q. Have you ever heard it dealt in in the market?

A. They do not designate merino when selling wool. They have other classifications for it.

Q. So that the word "merino" is not used in describing the origin of the wool in the market today?

A. Oh, in the market it is used as describing a wool. For instance, when I am abroad and buying fine clothing, a man will say to me: "That is made of fine merino."

Q. But is not "merino" as applied to wool an adjective to determine the grade or the fineness of the wool?

A. No, sir. It determines the origin, the blood.

Q. Do you know the origin of the word "merino"?

406 A. I know that the merino sheep originally came from Spain—the finer blood.

Q. Don't you know that the word "merino" is a Spanish word?

A. I just said that the original merino sheep came from Spain—the fine-blooded rams that they got to improve their blood. They took some out into Ohio at one time, and they were taken to Australia.

Q. You say it is the policy of your house to instruct the salesmen as to the make-up of the merchandise that is offered to the public?

A. Yes.

Q. And that policy is very carefully followed in that the contents, whether it be underwear or any other article in which you deal, the make-up or the character of it is brought home to the customer?

A. Yes.



Q. That applies in every one of your advertisements, does it not?

A. Yes.

Q. And in instructing your salesmen in the underwear department, if an article had been marked "merino" the salesmen  
407 would have been instructed to tell the customer that that article was a garment made of a mixture of cotton and wool?

A. We do not instruct our salesmen that, so if they do not follow our instructions, why, that is an oversight. We have a list made out showing the proportion of wool given by the manufacturer, and we so inform our salesmen.

Q. Is it not a fact, Mr. Turnbull, that it is the policy of your house to sell all of your underwear in your own containers?

A. That was because of this misleading label.

Q. Your attention was brought to the fact that the question of possibly misleading the public was made the subject of investigation by the Federal Trade Commission?

A. Oh, long before—if you mean that that was the reason for our changing, that is not the fact.

Q. It was not the reason for your changing it?

A. No.

Q. What was the reason for your changing it?

A. The reason for changing from the manufacturers' boxes to our own boxes?

Q. Yes.

408 A. It was so that we would not mislead the public.

Q. And the boxes in which you sell the merchandise to the public, is there any descriptive word on those boxes as to the contents of the garment?

A. No; I do not think there is.

Q. Is there anything to indicate that a garment purchased by a customer who patronizes you is a fabric made of all wool or of part wool and part cotton?

A. Yes; I think there is, but I am not familiar with the exact marking. Our underwear buyer can testify as to that.

Q. Are you familiar with the marking and brands of underwear sold by other manufacturers?

A. No, sir.

Q. And yet you have testified here of your knowledge of the branding by various manufacturers of underwear, and you now state that you are not familiar with the branding.

A. I am familiar with the branding of underwear, because we buy from a great many manufacturers. There may be manufacturers of brands of underwear that I never bought from, and I would not  
testify of my knowledge of it.

409 Q. Have you even seen the brand of underwear made by manufacturers from whom you have purchased merchandise?

A. Yes; I have seen the boxes.

Q. Have you ever seen the brand or the labeling of the merchandise as sold by your house to your customers?

A. Yes.

Q. What descriptive words are contained upon the merchandise or containers that you offer to your customers indicative of the contents of the garment?

A. That I could not give you, because I am not familiar with it the last few months, and there might be a change, and I do not want to mislead.

Q. We will get back to the period since this change has taken place, and your desire to avoid any deception of the public, when you changed the policy of your house, in offering merchandise in the original container or with the original brand as put up by the manufacturers, and when you put them in your own containers or with your own labels?

A. They were put in plain boxes originally, and the instructions were given to the salesmen of the contents.

Q. But nothing on the box?

410 A. That I can not say now, because you have asked me to testify how they are now, and I do not know.

Q. During any of that period were the percentages of wool and cotton in the garments made partly of wool and partly of cotton indicated on the box, label, brand, or anything else attached?

A. They were indicated on a memorandum that every store had.

Q. But as far as the customer was concerned, the customer would have to depend upon such knowledge or information as he received from the salesman to indicate the contents of the garment?

A. Yes; when he was selling it.

Q. So that it is left entirely with the honesty of the salesman as to whether or no the customer believes he is getting an article of all wool or part wool and part cotton?

A. Not exactly that.

Q. Then what other means would the purchaser have to determine whether a garment was all wool or part wool and part cotton?

A. He was told when he made the purchase.

Q. Exactly, but he was told by the salesman?

411 A. Yes.

Q. In order to give information as to the contents of that garment?

A. Yes.

Q. But if the salesman told him the underwear was all wool, when as a matter of fact it was part wool and part cotton, the purchaser would be deceived by that in buying that article?

A. He would be deceived.

Q. So that there is no protection to the purchasing public, as far as buying underwear garments is concerned, excepting depending upon the truthfulness of the salesman in describing the contents of the article sold?

A. The salesman has not any great difficulty in being truthful, because he has this list showing the component parts of each grade of underwear that he sells.

Q. But the fact remains that it is up to the salesman in stating truthfully the contents of the article, whether or not the prospective purchaser is deceived or not?

A. Yes.

Q. In your connection with the Rogers Peet Company have you bought underwear?

412 A. I have never bought underwear myself.

Q. Are you acquainted with the manufacturers of underwear?

A. No; I am not acquainted with the manufacturers of underwear. I check their bills.

Q. Do you know by reputation as to the standing of various manufacturers of underwear?

A. In a general way I do; yes.

Q. And the relative standing among the best in the industry?

A. Yes.

Q. What is the standing of the Glastenbury House?

A. I think it stands very well.

Q. The American Hosiery Company?

A. Good standing, as far as I know.

Q. Are they houses representative of the highest standing in the industry?

A. Well, I am not familiar enough—by highest standing do you mean quality, general integrity, and good standing?

Q. Integrity of merchandising?

A. Perfectly all right.

413 Q. Integrity of their merchandise?

A. Perfectly all right.

Q. The house of Rogers Peet and Company has a standing in the community for integrity of merchandise, has it not?

A. Yes; it has.

Q. So that I ask you to apply the same relative position, in the industry of manufacturers of underwear, that the American Hosiery Company and the Glastenbury House occupy in the industry, as compared to your own house, in the branch of business in which you are engaged.

A. Now, just what do you mean?

Q. You consider, do you not, that Rogers Peet Company house stands among the foremost retailers of men's furnishing goods?

A. I want to be very modest about that. We hope we do.

Q. I join with you. Now, in comparing the houses of the Glastenbury Mills and the American Hosiery Company Mills in their particular industry, what would you say?

A. That they stand all right. I think there is no question about it.

Q. Do you say they stand among the leaders in the industry?

414 A. I think so.

Q. Do you know the Winsted Mills?

A. I know of them. We buy through another concern, a selling concern.

Q. And you would put them in the same position?

A. I would if we buy their merchandise. We usually buy from good people.

Mr. MOLLOY. That is all.

GEORGE FULLER was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. State your business.

A. At the present time I am fabric expert with the American Wool and Cotton Reporter.

Q. Where is that located?

A. The main office is in Boston. They have a branch here.

Q. Have you in the past been connected in one way or another with the manufacture of textiles?

415 A. Yes.

Q. Will you please state briefly your experience in that respect?

A. I went to the Lowell Textile School and graduated there with honors in 1903; and previously and during the time in the summers I was connected with a number of mills. After graduating from the Lowell Textile School I was employed by the largest manufacturer of fancy cotton goods in the country, being employed in various positions up to assistant manager, for a period of nine or ten years. Since that time I have been employed as associate editor and fabric expert with the American Wool and Cotton Reporter.

Q. During your experience you have become familiar with the terms used in the trade as distinguished from the public use or common use of the word "merino"?

A. Yes.

Mr. MOLLOY. I object to the way the question is framed, as indicating that there is any distinction between the use of the word by the trade and by the public.

Examiner McKEAG. If there is any the witness may state it.

416 Mr. MOLLOY. Ask him if there is any.

Mr. CLARK. I will.

Mr. MOLLOY. And the specific terms.

Mr. CLARK. Let us have the question repeated.

(The stenographer read the pending question as follows:)

"Q. During your experience you have become familiar with the term used in the trade as distinguished from the public use or common use of the word 'merino'?"

A. Yes.

Mr. CLARK. Any objection?

Mr. MOLLOY. No.

By Mr. CLARK:

Q. Are you also familiar with such terms as "natural merino" and "natural wool" and "Australian wool"?

A. Yes.

Q. "Gray wool"?

A. Yes.

Q. As an expert in the manufacture of textiles, will you explain what is the distinction in the art between the term "wool" and "worsted"?

A. Worsted is a combed material.

417 Q. What material?

A. It may be a number of different kinds of wool, depending on what merchandise is to be made from it. It is first carded and then combed. A woolen fabric is made of wool of different grades, but only carded. It is not combed.

Q. Please define the two processes, combing and carding.

A. Well, a card is a long machine through which the wool passes. The fibres are pulled, by rollers, which comb various imperfections out of it. When it comes to the end of the machine it is rubbed into the form of a thread. If it is to be combed subsequently and made into a worsted yarn, it is taken in the form of tops—it is made into the form of tops and combed.

Q. What results from the operation of combing in addition to carding?

A. Combing takes out the short fibres. It makes a better, smoother yarn—that is, it runs the fibres more parallel than in the carded yarn.

Q. What is the principal distinction as understood in the textile industry of the term "worsted" with respect to the fabric to which it applies?

418 A. It generally means a better fabric, because it is more expensive to make. It is a smoother-looking fabric, because the fibres project less. They are more parallel.

Q. Does it apply to more than one substance?

A. Do you mean anything else but wool?

Q. Yes; in the textile industry?

A. Why, yes; it applies to cotton yarn. Cotton yarns are combed and carded, if that is what you mean.

Q. Taking the term "worsted" alone, what does it mean?

A. It means merely a combed wool yarn. That applies to the manufacturing trade, not to the distributing trade.

Q. My inquiry was directed to the manufacturers. Have you had occasion in your long experience to acquire an idea as to what the public understands by those terms?

Mr. MOLLOY. I object to that. He has already stated his qualifications. From the qualifications he has stated he has shown that he is in no position to answer the question.

Mr. CLARK. I submit he has not in any way excluded such experience.

419

By Mr. CLARK:

Q. Will you state what experience you have had which would help you in expressing an opinion as to the public's understanding of these terms "merino," and so forth?

A. Since I have been connected with the American Wool and Cotton Reporter I have at various times made investigations as to the amount of deception which is practiced on the public. This involves to an extent underwear, woolen fabrics of various kinds in suits—I mean in garments. It applies to the use of artificial silks. It applies to the use of linen as a substitute for cotton. It applies to the use of mercerized cotton yarn for silks. At various times and to a different extent I have had quite a number of editorials on the matter; also on the use of deceptive labels or signs in the retail trade. That has been a part of my business since I became connected with the publication.

By Examiner McKEAG:

Q. How did you make that investigation?

A. I go into the retail stores, ask the retail buyers various questions. I look at the signs and by making tests I am able to  
420 tell the composition to a large extent, not entirely, but to a large extent, whether there is deception being practiced. Just as an illustration, I happened to be in Wanamaker's some years ago. I found a lot of silk fabrics that were called imported. I am positive from my training and for various reasons that the merchandise never could have been imported, because it could be made here cheaper. At various times I have had arguments and discussions with buyers about the composition of the merchandise which they have bought, on which they themselves had been deceived.

We have had any number of inquiries at various times, submitting samples to determine in the first place the relative composition of various fabrics, and to determine to what extent the merchandise is deceptive. That applies to sheeting fabrics. I may state here that there is not a single buyer who can tell the character of goods he buys. I do not care who the buyer is, I will apply that to anyone or anywhere. There is not a single buyer, unless he makes very careful and exact tests, who can tell the composition of one fabric. I  
do not care how far you go by that.

421

By Examiner McKEAG:

Q. Except by chemical analysis?

A. Not entirely by chemical analysis, although chemical analysis in a great many instances is quite necessary.

By Mr. CLARK:

Q. Has this long experience of yours covered the use of such terms as those I have mentioned, on similar classes of garments?

A. It has covered suits. It has covered to an extent underwear and hosiery.

Q. As the result of such investigations, what is your opinion of the understanding by the public of the term "merino"?

By Examiner McKEAG:

Q. As applied to underwear.

By Mr. CLARK:

Q. As applied to underwear.

A. They understand that it is wool. There are very few customers, very few consumers who do not understand the term "merino" as applying to a sheep. That is the general understanding.

422 A. Anyone who has ever heard the term "merino" knows that it applies to a sheep, a character of sheep—I will say the very great majority of consumers.

Q. Does that apply to the term "natural wool"?

A. They know that wool comes from a sheep.

Q. And it is unnecessary to mention the others, "Australian wool" and "gray wool," which happen to be in the petition here?

A. They understand "wool" as being wool.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. You said you had had very little experience in the underwear branch of the industry?

A. Only to the extent that I have investigated what retailers have offered, and talked with their buyers at various times.

Q. How long since you made your investigation in the underwear branch of the industry?

A. I do not think I have done anything on underwear or hosiery inside of five years.

423 Q. When did you make this investigation in the underwear industry?

A. When did I?

Q. Yes; when did you?

A. I should say it was probably seven or eight years ago. It may have been six years ago.

Q. Was that the only investigation you made of the industry?

A. That is the only investigation of underwear.

Q. You have made none since?

A. No.

Q. How long did it take you to make that investigation?

A. That would be hard to say.

Q. A matter of weeks or a month?

A. I did not spend any definite time in making the investigation. What I mean is, it was supplementary to the ordinary run of my business.

Q. But state approximately the amount of time you spent in making the investigation.

A. I imagine I spent possibly all together three or four days, possibly a week.

424 Q. Three or four days or a week; and was that investigation made here in New York City?

A. Yes.

Q. Not made in any other places?

A. Nothing only that it supplemented what experience I had had at various times in buying myself and talking with other people on the subject.

Q. That is, buying for your personal needs?

A. Yes.

Q. Have you ever been in the manufacturing branch of the industry; that is, the underwear industry?

A. I have had no connection with it, except that I have been in the mills.

Q. That is, you have gone through the mills and seen the process of manufacture?

A. Yes.

Q. Have you had any experience in buying underwear for retail stores?

A. No.

Q. Have you had any experience in distributing, other than your investigations that you say you made for three days or a week?

425 A. Nothing only to the extent that I am acquainted with the garment trade, and more or less regularly talked with the distributors of underwear and hosiery.

Q. And during this investigation of three days or a week your investigation took you around into various stores, and you interviewed salesmen and distributors in those stores, and it did not involve the interviewing of people who came into the stores, did it?

A. Except to the extent that while I was there, and what the salesmen and officials told me.

Q. That is the occasional conversation that might have taken place while you stood at a counter interviewing a salesman, what you would hear because you would be in a position to listen?

A. Yes.

Q. But aside from that it did not form any special part of your investigation?

A. No.

Q. Then, how can you say, in all fairness, Mr. Fuller—and I know that you want to reflect that sentiment on the record—how can you say that you can speak of the impression gained by the general public as to whether an article marked "Merino" means an all-wool garment or not?

426 A. I think you—

Q. I want to be fair to you, because in dealing in generalities sometimes we get a little far afield; but I know you want to be exact in your testimony, and I give you the opportunity of correcting it if you desire.

A. It is rather difficult to explain just where I get my information. I don't know—



Q. Just one moment. You did not get it from the investigation you made at that time, did you?

A. Not entirely; no.

Q. Nor from the conversation that you heard, of prospective purchasers with the salesmen during the period of those investigations?

A. That merely checked up information or opinions which I had held, and which subsequently and previously—it is merely confirmation of what I had in my mind.

Q. Did you hear any prospective customer ask the salesman, while you were conducting this investigation, "Give me an article marked 'Natural wool'"? Or can you recall to mind any particular article that a prospective purchaser asked a salesman to exhibit or sell to her in the presence of your interview?

427 A. They did not sell them that way.

Q. During the course of this investigation made by you did you hear any doubt expressed by a prospective purchaser as to the meaning of the word "Merino"?

A. They doubted the statement.

Q. I ask you whether you heard any one, whether there was any particular instance of a doubt expressed as to the meaning of the word "Merino" by a prospective customer to the salesman?

A. Yes. That is just what I was going to say.

Q. All right. When and where?

A. I can not tell the exact location, but it was in one retail store on Broadway, where I was talking to a buyer. I could not say the location, but it was about, I think, almost Thirty-eighth Street—between Thirty-fourth and Forty-second some place, on Broadway, that I was talking, in a store that had underwear in it.

Q. How was the underwear marked?

A. How was it marked?

Q. Yes.

A. I believe it was marked "Merino underwear." I would  
428 not say positively about the underwear, but I know the word "Merino" was in it on the ticket on the box.

Q. Do I understand you to say that your understanding of the meaning of the word "Merino" as applied generally to the underwear industry, by consumers who purchase the articles, is that it means a fabric made of wool?

A. Yes—not in the trade.

Q. What is its meaning in the trade?

A. Well, the meaning in the trade of course is that it is a composition, because it has come to mean that.

Q. When did it come to mean that?

A. I could not say that. It is a growth, just the same as anything is a growth in the trade. It could not have meant it at one time.

Q. Have you had occasion to look up the word "Merino" in the ordinary dictionaries that are used in indicating the meaning of words in the English language?

A. No.

Q. You have not?

A. No.

Q. How long does your experience take you back in the textile trade?

A. To about 1898.

429 Q. And during that time is it not a fact that the word "Merino" has been generally used in the underwear trade as meaning a garment made of a mixture of cotton and wool?

A. I did not know anything about the underwear trade until about ten years ago.

Q. During the last ten years is not that the fact?

A. It means as you say.

Q. And the distributors buying from the mills understand the meaning to be that of a mixture of wool and cotton, during the ten years of your experience?

A. I should say so, yes.

Q. And the retail stores buying either from the manufacturers or the distributors so understand the meaning of the word—to mean a mixture of wool and cotton?

A. I do not think they know anything about it.

Q. Do I understand, then, that the retailers do not know what they are buying?

A. Absolutely not, and a great many distributors. That applies to everything now.

Q. Not to everything?

A. Most everything.

430 Q. We are dealing with the issues involved in this proceeding.

A. Well, textiles. How can he know. He has no way of testing. He can not tell by the feel.

Q. Were you in the room a few minutes ago when the president of Rogers Peet Company testified?

A. Yes.

Q. Did he not testify that he was able to tell what the ingredients were of the articles that he purchased?

Mr. CLARK. I object to that. I do not think that was the testimony.

Mr. MOLLOY. Yes, that is what he said.

The WITNESS. I wish you would verify that. He said he could tell that there was wool in it, and that is true.

Mr. MOLLOY. And he testified further that he had means of determining whether it contained it or not.

A. He has the means of determining that, but there is not one store in a hundred, not one store in a thousand, that has. The National Clothing and Suit does, and Rogers Peet does, but there are very, very few.

431 Q. So that when you state that the retailers are unable to determine, you mean by that only where they do not investigate the contents of their garments?

A. They are not capable of investigating them. You can not make a trained man out of an ignorant one.

Q. During your ten years of experience in the underwear industry, don't you know that articles have been manufactured and distributed under such phrases as "Natural wool" and "Natural worsted" as being garments containing part wool and part cotton?

A. I know that.

Q. And that has been the generally accepted custom in the underwear trade, has it not?

A. Yes.

Q. And has existed continuously, or during the last ten years that you have had any experience in the industry?

A. Yes.

Q. Have you made a study of the meaning of various terms and phrases that have come to describe articles entering into the general industries?

A. More or less, yes.

Q. More or less of a student, in looking into these questions  
432 as aiding you in your editorial work in connection with the publication?

A. You must do it, or you will get picked up, and we do get picked up sometimes.

Q. How is it that in anticipating testifying in this proceeding, and in discussing the use of the word "Merino" you have not had occasion to look and see what the meaning of the word is, as contained in the dictionaries that we usually go to to refresh our understanding when perhaps there is a doubt in our mind as to the meaning of a word?

A. I naturally do not go to the dictionary to look up the meaning of "cat" or "rat." I know that it applies regularly. I know that "Merino" means a sheep. I know that it did mean a sheep when I was in the textile school, and I presume it meant it for a long time previously.

Q. Don't you know that words in the English originally descriptive of an article have by the development of the language acquired other meanings that become accepted at a later date and become part and parcel of the English language?

A. Yes; that is true.

Q. Do you know the word "calico," for instance?

433 A. Yes.

Q. Do you know what it originally meant?

A. I do not say that I could tell you.

Q. To-day the general usage of the word means a cotton cloth, does it not?

A. To the extent that a Packard means an automobile; yes.

Q. What would you in your experience and intimate knowledge of the various cotton and wool industries give as your understanding that the public generally would have of the word "calico"?

A. They presume that it is a printed fabric.

Q. Would they believe that it came from mills in Calcutta?

A. No.

Q. They know that the fabric might be made in any mill?

A. They know or are likely to know that it is made in any mill.

Q. You have testified that it is your impression, gained by  
434 this three-day investigation of the underwear industry that  
the purchasing public understand the word "Merino" to  
mean a fabric made of all wool and coming from a merino sheep.  
That I understand was your answer?

A. Except as to the last part. I would not say that they understand that.

Q. They do not understand what?

A. They do not understand that it comes from a merino sheep, but they understand that it is wool. If you say "Merino" to them, and they think of anything, they know that that means a sheep, but any one applies the term wool when there is the name "Merino" on a box.

Q. So that you testify to the fact that it is your impression that the public generally understand the word "Merino" as indicating an all-wool garment?

A. Yes.

Q. As applied in the underwear industry?

A. Yes. Let me add: I tried to explain a few minutes ago where I got the impression, and where I confirmed the impression in addition. My business brings me in touch with a lot of people. We have a tremendous number of inquiries from different sources  
435 at different times. This investigation that I made merely confirmed facts which had been coming to our attention, which I had gained through association with the inquiries which I answered, and the consumers with whom I am bought in contact. I am brought in touch with all parts of the trade.

Q. Mr. Fuller, the American Wool and Cotton Reporter is a trade journal, is it not?

A. Yes.

Q. Its distribution is limited to the trade, is it not?

A. No.

Q. How many subscribers have you to the American Wool and Cotton Reporter? What is the extent of your circulation?

A. I could not say, exactly. I think it is about 7,500.

Q. And of that 7,500 how many subscribers have you on the books that are merely the general ultimate consumers and not interested directly or indirectly in the trade that your paper is specially devoted to?

A. That is difficult to say, but a great many of the retail stores buy it for their heads of departments.

436 Q. And they are allied with the industry that your paper is especially intended to serve?

A. Yes.

Q. How many individuals that are not interested either directly or indirectly, either retail or wholesale, or as employed in the various branches of the industry, that your paper features, are subscribers to your journal?

A. I would not say the number was very large.

Q. Would there be any?

A. Oh, yes; we have quite a number of subscriptions in the libraries and in the colleges.

Q. Places for reference—reference libraries?

A. Yes.

Q. And the usual free list that magazines have?

A. That was cut out some time ago, largely.

Q. So what occasion would the general public have to write to your journal of complaints in the buying of merchandise?

A. That is just what I tried to explain to you, that we have so many different inquiries from so many different people that there is not a week goes by that I do not have anywhere from twenty-  
437 five to possibly fifty people come to see me about various subjects, in the office.

Q. Have you had any inquiries from this vast number of the general public as to the use of the word "Merino?"

A. No.

Q. Has there ever been a letter received by the American Wool and Cotton Reporter from any individual or any number of individuals which indicates that the word "Merino" was misleading?

A. Well, let me explain again.

Q. No, I ask you, has there been or has there not?

A. Yes.

Q. Do you keep complete files of all correspondence?

A. The files are kept in Boston. We have none here.

Q. Where did those communications come to, complaining about the use of the term "Merino?"

A. Some of them came from right here in the market.

Q. I mean what office did they come to?

A. Most of the inquiries come to the Boston office, and if they can be answered here, they are.

Q. The records are kept either here or in Boston?

A. In Boston.

Q. What is the name of your corporation?

438 A. S. P. Bennett & Company.

Q. And they are a concern of some standing?

A. Well, they are a well-known publishing concern.

Q. Do they publish any other than this journal?

A. Yes.

Q. These complaints that you have received, have they been received recently?

A. I have not received a complaint except by telephone, and I would not say how long. In fact, I would not say definitely that we have any on record, but they have come in written, and I have

had possibly—well, let me explain. Now we have inquiries—the reason I say this, we have inquiries almost every week from people, in the trade, for instance. As an illustration, the Federal Reserve Board telephoned to me last week wanting quotations on various wools. They are all tangled up. They have not the least idea. They know what wool refers to, but they want to get the details. They do not understand. There are a number of different varieties.

Q. Get down to this point.

A. It shows their conclusions about the term. They have the  
439 idea in their heads, but they are ignorant as to the application. That is what I want to bring out.

Q. And you attempt to educate them because of their ignorance?

A. I have to do as much as I can; yes.

Q. And did it ever occur to you that you might be ignorant yourself as to the meaning of the word “merino”?

A. Well, I am ignorant on some other subjects. I might be on that.

Q. Have you had occasion to refer to Cole's Dictionary of Dry Goods?

A. Not for seven or eight years I have not.

Q. You know it is the standard dictionary of the terms used in the textile and dry goods industry?

A. Yes; I understand it is.

Q. And I understand your testimony to be that your knowledge of the use of the word “merino,” applied generally, as distinguished from its technical meaning in the trade, is that it means an article made of all wool?

A. Technically that is true, but practically in the trade it is not.

Q. I say, speaking technically in the trade, the term indicates an all-wool fabric?

440 A. Yes.

Q. And that you have testified to is the understanding of the general public?

A. Yes.

Q. As to its meaning?

A. Yes.

Q. What would you say of the knowledge of the general public as to the meaning of any word in the English language?

A. It is a growth largely in a great many cases.

Q. Are you a college man?

A. A technical school man.

Q. You know that the English language has been a progressive thing, do you not?

Mr. CLARK. Oh, I object to that. We have other witnesses waiting, and this is going round in a circle.

Examiner MCKAIG. I want to give counsel full latitude. I will permit him to go along awhile longer.

Mr. MOLLOY. I object to the intimation that I am to be shut off in the conduct of my examination. We have been visited here

441 this morning, as we have for three days, with repetition, repetition, repetition of similar testimony.

Mr. CLARK. By different witnesses.

Mr. MOLLOY. I am on cross-examination, and the latitude of cross-examination is my privilege.

Mr. CLARK. I have indulged you, I think.

Examiner McKAIG. As far as I am concerned I will see that you have ample cross-examination. What I mean is, confine it as much as possible.

By Mr. MOLLOY:

Q. The English language of Chaucer's and of Shakespeare's day is different than the English language of to-day?

Mr. CLARK. I object. That has all been covered.

Examiner McKEAG. Go ahead.

A. Yes.

By Mr. MOLLOY:

Q. Take the word "calico"; the original meaning was intended to describe a fabric made in Calcutta.

A. I believe you are right.

Q. But it has acquired a common ordinary meaning of a printed cloth to-day?

A. Yes.

442 Q. Take the word "roan"—a roan horse. The dictionary tells us that the word originally was descriptive of a horse in Rouen, France. And yet what would be your understanding of the word?

A. I understand it, and I presume other people do, as a certain color of a horse.

Q. And the word "gingham," which the dictionaries tell us was originally an article made in Guingamp, French Flanders, now has a very understandable meaning as descriptive of a cotton cloth, has it not?

A. Yes.

Q. And the general public obtain their knowledge of the meaning of these words through usage and the dictionaries, do they not?

A. I would not say the dictionaries. I think it is more a general growth in ordinary conversation.

Q. In general conversation?

A. In general conversation and contact, rather than from dictionaries.

Q. You think that the dictionary plays no part in the understanding of the English-speaking people as to the meaning of the words they use?

443 A. I stated it in regard to these few terms which you mentioned. I do not say that even of those. I said I thought the common contact played its part, and that is my personal opinion.

Q. If the ordinary common dictionary, in the defining the meaning of the word "merino" specifically indicates it as a fine fabric



made originally of merino wool, but later of fine wool mixed with cotton, what reason have you to say that you have gained the impression that the general public understand the word to mean a fabric made entirely of wool at the present time.

A. The man that wrote that in the dictionary was not technically qualified to put that term in there, because if he did, he was unfamiliar with the subject. The man that wrote that in the dictionary was unqualified to write it.

Q. I understood you to say that Cole's Dictionary of Dry Goods terms is considered a standard?

A. Nevertheless everyone makes mistakes, you know.

Q. Do I understand that you want to put yourself up as an authority as against Webster's Dictionary and George S. Cole as to the meaning of the word "merino" as used in the English language?

444 Mr. CLARK. I object to that question, as assuming that Webster's Dictionary and George S. Cole define the term in any particular way. There is no evidence as to that.

Mr. MOLLOY. I will offer it in evidence. You do not question my excerpts from the dictionaries, do you?

Mr. CLARK. I have not seen them and do not know what you are talking about.

Mr. MOLLOY. It is in the brief and has been there for a long time.

Examiner McKEAG. Assume for the sake of this question that Mr. Molloy has stated it correctly, and permit the witness to answer.

Mr. MOLLOY. I ask the question.

Mr. CLARK. If you state that you understand that to be the definition given in the dictionary—

Examiner McKEAG. He is assuming that in his question. Read the question.

(The stenographer read the question as follows:)

Q. "Do I understand that you want to put yourself up as an authority as against Webster's Dictionary and George S. Cole as  
445 to the meaning of the word 'merino' as used in the English language?"

A. I am as much of an authority as George S. Cole or whoever wrote the dictionary on that particular term. I will go on record as saying that I am considered an authority in the trade.

Q. You are considered an authority?

A. Yes. I will go on record as saying that man did not know what he was talking about.

Q. And you go on record as being an authority in giving the ordinary meaning of the word "merino" as defined in the commonly acceptable dictionary of to-day as against the definition of Webster in his International Dictionary?

A. Whoever wrote that was not familiar with conditions.

Q. In other words Webster when he inserted that in the dictionary did not know what he was talking about?

A. He did not.



Q. And George S. Cole, when he defined "merino"—  
Examiner McKEAG. You have been over that once.

Mr. MOLLOY. No, I have not read Cole.

The WITNESS. You know there are a great many mistakes—

446 By Mr. MOLLOY:

Q. One moment. George S. Cole, in the dictionary of dry goods terms, in the edition of 1890, defines merino as follows—

Mr. CLARK. I object to that.

Mr. MOLLOY. I am offering it subject to correction. I will permit counsel to read it.

Mr. CLARK. Mr. Molloy can not testify.

Mr. MOLLOY. You asked me to put it in evidence.

Mr. CLARK. I asked you to state it by stating that this is what you understand to be his definition.

Examiner McKEAG. I will permit Mr. Molloy to read his excerpt as copying the definition of the dictionary. If it is not correct, you can introduce the dictionary itself.

Mr. CLARK. I just want him to state that he has copied it, that is all.

By Mr. MOLLOY:

Q. George S. Cole in his dictionary of dry goods, edition of 1890, quotes as follows:

447 " 'Merino' is also the term applied to a variety of medium weight knitted underwear which was formerly made of pure merino wool, but now of cotton, or half and half."

In the edition of 1892, which he quotes:

" 'Merino' is also a term applied to a variety of medium weight soft finished knit underwear formerly made of merino wool, but now of cotton and wool mixed."

The correctness of the quotation will be submitted to counsel, and, if the quotations are as I have stated, then it is understood they will be received; and, if not, then they may be stricken out, and consent is given for that purpose now.

Mr. CLARK. Excuse me. Then you are introducing that in evidence?

Mr. MOLLOY. Yes, on that stipulation.

Mr. CLARK. No objection at all.

By Mr. MOLLOY:

Q. Then I understand, Mr. Fuller, that Cole was all wrong?

A. No; I agree with that; but there is a great difference between the trade and what the consumer thinks.

Q. Then Cole was right, but Webster was wrong?

A. I have not heard you read Webster. I admit that Cole is right.

448 Mr. CLARK. Do you offer this in evidence?

Mr. MOLLOY. I offer Webster's New International Dictionary definition:

"Merino. A fine fabric originally of merino wool, but later of fine wool mixed with cotton."

The same stipulation is offered in regard to that quotation.

By Mr. MOLLOY:

Q. Mr. Fuller, do I understand that that definition is all wrong?

A. I admitted previously to your reading either of them that that was the case.

Q. That they are both wrong?

A. No; that they were both right. In my previous testimony I admitted that that held true.

Q. So that the dictionary generally used describes merino as a fabric made of part wool and part cotton?

A. Yes.

Q. Then what reason have you to believe or to state that it is your opinion that the general public believes that the word merino means a fabric of all wool when the ordinary dictionary of the day

449 describes it as a fabric made of part wool and part cotton?

A. Because undoubtedly Webster and the other man went to the trade to find their term and what it expressed, and they did not go to individuals. They went to manufacturers, the same as I can and the same as you can and other people can, and the terms that apply to the manufacturers do not in all cases apply to the consumer.

Q. Do you consider Webster's dictionary as a dictionary of trade terms or phrases?

A. No; but that is where they would go for that particular term. They would not go to a consumer for it.

Q. Where do they go to get the meaning of any word used in the language?

A. They would probably go to the trade, and the trade is not always right.

Q. So that the general dictionary of the English language—the compiler of the dictionary goes to a man in the trade to find out the meaning, the accepted and general meaning of a word?

A. I presume that is true, because most of them that I have come in contact with do that.

450 Q. Do you think that is the way they found out the meaning of the word "gingham"?

A. I presume so.

Q. And that is the way they found out the meaning of the word "calico"?

A. I presume so.

Q. So that the meanings now ascribed to those words, as used commonly to-day, were acquired by the preparers of those dictionaries from men in the trade and not from the general public?

A. I believe so.

Mr. MOLLOY. That is all.

Mr. CLARK. At this time I should like to introduce, under the same conditions as you have stated, the definitions of the word "merino" by three standard American-English dictionaries.

The copy of the Standard Dictionary at present at the Congressional Library in Washington defines "merino" as follows:

"1. Of or pertaining to merino sheep or their wool.

"2. Made of wool from the merino sheep, as merino underwear."

Century Dictionary:

451 "1. Variety of sheep from Spain or their wool.

"2. Made of the wool of the merino sheep, as merino stockings or underwear."

American University's unabridged dictionary:

"1. Of or pertaining to a breed of sheep noted for wool.

"2. Made of merino wool."

And I state that there is no part of the definition of those terms in those dictionaries which says that it means a fabric, or that it applies to anything constituted of cotton and wool.

I do not think I will ask Mr. Fuller any more questions at all.

Examiner McKAIG. That is all, Mr. Fuller.

ROBERT E. WALKER was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Selling agent.

452 Q. For whom?

A. I represent the Medlicott Company, selling full-fashioned underwear.

Q. Where is the Medlicott Company located?

A. Windsor Locks, Connecticut.

Q. You say full-fashioned underwear?

A. Yes.

Q. Do they make an all-wool garment?

A. Yes.

Q. And for how many years have they done so to your knowledge?

A. I guess ten or twelve years, maybe more than that.

Q. And that garment is sold to retailers in the underwear trade in this country?

A. Yes.

Q. Do the Medlicott people also make a mixed-cotton-and-wool underwear?

A. Yes.

Q. How do they label their mixed?

A. Well, we used to mark it superfine Australian.  
453 Shetland or Scotch wool, according to different grades of wool.

Q. You used to so label them?

A. Yes.

Q. How do you at present?

A. I think at present we have taken off the word "wool," because we saw that it was against the law to do it.

Q. Do you use the term "merino"?

A. Not now.

Q. You say you saw it was against the law?

A. Yes; something I saw in the paper, something about the Federal Trade Commission. They never interviewed us, but we saw some things in the trade paper.

Q. And you adopted the suggestion?

A. Yes.

Q. No proceeding has ever been instituted against the Medlicott people or your firm?

A. No; I did that myself, because I was afraid they might be after us, and I did it so they could not come after us. I saw it in two or three different papers. Nobody ever told me anything about it. I read it, so I thought I had better take it off, because they  
454 might tell us to take it off.

Q. Did it strike you, at the time you saw that, that there might be some ambiguity in the use of those terms, or as to what they represented?

A. No; we thought it was very unfair to make us take it off.

Q. From your point of view as a jobber?

A. Yes; the way the goods were sold and the way the general trade buy them.

Q. You found it more difficult to sell them without those labels?

A. No. They have been buying them about eighty years under those labels; the same stamp. In fact, they buy them by number, and they do not ask for wool or cotton. They buy them by numbers, practically.

Q. What would have been the objection to putting on those garments just exactly what they were?

A. I do not suppose there is any, because they were made all along, so many years, that way.

Q. A matter of convenience?

A. Just a matter of going through the way they started to make them; as I say, about eighty years they had been making them.

455 Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. You say they have been marked that way for eighty years?

A. I think seventy-five or eighty years the mill is up there.

Q. And the word "merino" has been used as describing a mixture of cotton and wool during that period?

A. That is the way we designated what was in use.

Q. Was there ever a complaint lodged against you, as far as you know, as to the impropriety of using the word "merino" in describing a fabric containing part wool and part cotton?

A. Never.

Q. And your only reason for discontinuing the use of that word in describing the article made of that composition was because the Federal Trade Commission instituted this and similar proceedings?

A. That is the only thing.

Q. And rather than be involved in the aggressive attitude of the Government in charging—

456 Mr. CLARK. I object to any such characterization.

By Mr. MOLLOY:

Q. Rather than be involved in having the Government charge you as doing something unfair in competition, and using fraudulent and deceptive brands and labels, you abandoned the use of the word "Merino" for the time being?

A. Yes; that is the only reason why we did it.

Q. Have you ever heard anybody in the trade, manufacture, distribution, or the public at large, question as to the meaning of the word "Merino" as indicating a fabric containing part wool and part cotton?

A. I never did.

Q. How long have you been connected in the industry?

A. I guess pretty nearly thirty-five years.

Q. During that period in what capacity?

A. Selling agent, going around to the mills and things like that, and buying.

Q. During those years of experience you have come in contact with the public at large in connection with your merchandise?

A. Yes.

457 Q. Have you come in contact with the retailers?

A. Yes.

Q. And the salesmen in retail stores?

A. Yes.

Q. Have you ever heard the salesmen or the retailers or anyone connected with the distribution of underwear marked "Merino," say anything that would indicate to you any impression on the part of the general public that purchased these garments that they contained anything other than wool and cotton?

A. No.

Redirect examination by Mr. CLARK:

Q. You never have sold underwear over the counter, have you?

A. No, sir.

Q. Your experience has been in the trade?

A. In the trade.

Q. With the retailers?

A. No; jobbers and retailers both.

458 Q. When you speak of the continuous use of the label for seventy-five years, you must be drawing on the recollection of somebody else?

A. Yes, to be sure; but I know it has been there.

Q. That is your information?

A. That is my information.

Q. How old is your house?

A. The Medlicott Company?

Q. Yes.

A. About seventy-five or eighty years.

Q. It must be one of the oldest in the country?

A. One of the oldest, one of the first.

Recross-examination by Mr. MOLLOY:

Q. Do you know the Winsted Hosiery Company?

A. I know them, yes.

Q. That is considered a pretty old mill?

A. A pretty old mill, yes.

Q. What would you say as to its relative standing among those of the best manufacturers of underwear in the country?

459 A. They make pretty nearly as good goods as the Medlicott Company. I used to represent them years ago.

MAX KÜHN was called as a witness, and having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. I am the president of the Stuttgard Underwear Company.

Q. Where are they located?

A. They are located at 456 5th Avenue, New York City.

Q. And what do they manufacture?

A. At the present time underwear exclusively.

Q. Do they manufacture some all-wool underwear?

A. Yes.

Q. And they have for a number of years past?

A. Fifty-one years.

Q. Largely all wool?

A. Well, no. Many years back, twenty years ago we made more wool, more pure wool than we made part cotton, but since that  
460 time we have made a larger proportion of cotton mixture.

Q. Can you give us an idea approximately of the extent of the business, say the annual average of the last five years, either in the volume, by dozens of garments, or by the money value?

A. Oh, the proportion is at least 75 to 1 cotton mixtures in the last five or I dare say ten years. It is growing and growing, and I venture to say to-day 90 per cent, if not more, of our business is part cotton.

Q. About what turnover does that represent?

A. Well, what do you mean—in dollars?

By Examiner McKEAG:

Q. Annual productions?

A. In dozens?

Q. Yes; or in value

A. I do not think we sell more at the outside than a thousand dozen shirts and drawers and union suits of pure wool to-day out of possibly a production of 100,000.

Q. How do you account for the decline in the all wool?

A. I believe largely the price, and the wear, the shrinking  
461 of pure wool garments has decreased the sale of them.

Q. And the price?

A. And the price has a lot to do with it.

Q. It has been high, particularly during the war?

A. Very high, and also the general inclination of the trade, of the public, to get away from wool.

Q. But I suppose if the price of wool should decline there would be just so far a tendency to resume the manufacture of all-wool garments?

A. Why, I do not think so?

Q. So far, I mean, as the price declined?

A. I do not think so.

Examiner McKEAG. That is immaterial, Mr. Clark.

Mr. CLARK. Very well. Strike out that question.

Mr. MOLLOY. I think the witness has answered it, and I should rather have the question and answer stand.

Mr. CLARK. Let it stand.

By Mr. CLARK:

Q. How does Stuttgart at present label the mixed goods that it manufactures?

Mr. MOLLOY. One moment. I object to that as calling for  
462 an answer as to their present method of marking their goods, as outside of the issues in this case.

Examiner McKEAG. I think he may answer, subject to counsel's objection.

A. The pure-wool goods?

By Mr. CLARK:

Q. All.

A. We have always designated the absolutely pure-wool goods, ever since I remember anything about it, as absolutely guaranteed pure wool.

Q. Is that the precise language of your labels?

A. "Guaranteed pure wool." That particular label always distinctly stated "Guaranteed pure wool."

The label we employed on part-cotton goods, and have employed for the last forty years or more, since we are in this country, was simply an imitation of the pure-wool label, omitting the words "pure wool." We simply said "natural wool" in the days gone by. In recent years we have taken out the word "wool," and simply said "men's natural underwear." And then the third label simply is a trade name and does not say anything at all about wool or cotton.

Q. And that statement covers about how many years?

463 A. Anyway since we are exclusively handling American merchandise, which is since the beginning of the war.

Q. Since about 1914?

A. Yes. Before that we imported and used American-made stuff both. Since the war we have confined ourselves exclusively to American goods.

Q. Your statement just made applies to the labeling of the garments?

A. Yes.

Q. And how have you been labeling your boxes in which you put up your goods?

A. Why recently we have stated on the boxes "pure worsted" if the garment contained pure worsted; or when it was made of wool and cotton we labeled them "wool and cotton," and if it was made of mercerized and wool, or mercerized and worsted, we labeled them "mercerized and worsted."

Q. How long has that been your practice?

A. Just for recent years. I believe the last year or two, possibly. We did not do it before, because it was not the custom.

Q. You sell your products, both of wool and mixed, through-  
464 out this country?

A. Yes, everywhere in the United States.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. You say you have changed this manner of labeling your boxes in the last year or so?

A. Yes.

Q. Has it not been a fact that you have changed it, as other manufacturers have, since the commencement of these proceedings?

A. Precisely. Not these proceedings, necessarily. We have changed it, because as the previous witness stated, it has been a sort of bugaboo. Everybody got to talking about the possibilities, and we did it in order to avoid any complication.

Q. Due to the publicity given the proceedings brought by the Federal Trade Commission, attacking the propriety of using the phrase?

A. Exactly.

Q. In other words, as the last witness has testified, your  
465 house did not want to be in a position of having the Government charge you as being unfairly dealing in competition by the use of fraudulent or misleading or deceptive phrases or brands?

A. Precisely. That is so.

Q. Before that time you branded and labeled your merchandise by the use of the same descriptive terms that other manufacturers used?

A. As far as I know.

Q. And that custom existed for a great many years?

A. I have been in the line myself 32 years, and I have never known it to be anything different.

Q. Have you in your experience ever heard anyone in the trade generally or among the public at large who buy underwear question the impropriety of the use of those words and phrases?



A. Not at all.

Q. You are familiar with the use of the word merino as applied to underwear?

A. Yes, I think so.

Q. Is it not your understanding that that word as applied to underwear has generally been understood by the trade at large  
466 and the public generally as a word meaning a fabric made from wool and cotton—part wool and part cotton?

A. Yes, only.

Q. What has been your experience in the industry—just selling agent?

A. I have been a salesman myself. I started in as a scrub boy and went along the line, and I sold goods on the road for twenty-five or more years.

Q. Underwear?

A. Underwear only. I have been connected with this institution only, for the last thirty-two years, and I started in thirty-two years ago as a sweeper and general factotum. I sold goods on the road, and continue to do so. I even go out once a year now to my old friends on the coast, a sort of a pleasure jaunt.

Q. You come in contact with the retail stores?

A. Yes, only the retailers.

Q. You do not market your products through jobbers? You are a distributor directly to the retail stores?

A. Yes.

467 Q. And in such capacity you come in contact with the salesmen in these retail stores who offer the goods over the counter?

A. Yes.

Q. And naturally during the years of your experience you have come in contact with the salesmen in mostly all of the retail stores that your product goes into?

A. I have, and I want to say now that I personally have sold goods at retail over the counter, for probably five years prior to my connection with my present institution.

Q. Then from your contact with the salesmen in retail stores and also your experience as a salesman in the retail stores serving the public generally their requirements for underwear, have you ever heard any question raised by the consumer that the word "merino" meant a garment made partly of wool and partly of cotton?

A. Never to my knowledge.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK.

Q. There has been no proceeding by the Federal Trade Commission against the Stuttgard Company, has there?

468 A. Not that I know of.

Q. Do you recall the visit to you by Mr. Lent, the agent of this commission?

A. Yes.

Q. Recently?

A. Yes. He was there, I judge, about a month ago.

Q. And he interviewed you as to your company's practice in regard to the marking of goods?

A. Yes.

Q. And you told him substantially—

Mr. MOLLOY. I object to what the witness told him at that time.

Mr. CLARK. I withdraw it. If you had heard the whole of my question you might not have made any objection.

By Mr. CLARK:

Q. Do you recall the subject of that conversation?

A. I think I do. I think it was only along the general lines that we have been discussing, or rather that I have been answering along here. I could not remember exactly.

Q. After refreshing your memory as to that conversation, is  
469 it or is it not your judgment that the use of such terms as  
“natural wool” and “gray wool” and “natural merino” on  
goods composed of wool and cotton, and in which sometimes the pro-  
portion of cotton is greater than that of wool, is unjust and unfair  
as a matter of trade practice to those who label their goods with  
the contents specifically?

Mr. MOLLOY. One moment. I object to the question on the ground that it is calling for the conclusion of the witness on the issues in this case. I submit that that is for the commission to determine after hearing all the evidence, and not to accept the conclusion of this witness.

Examiner McKEAG. Is that your only objection?

Mr. MOLLOY. And also on the ground that it is immaterial, irrelevant, and incompetent.

Examiner McKEAG. I will let the witness answer, subject to your objection.

A. I did state that very emphatically, but I also said that while I considered that sort of thing unfair, it was the general custom and practice in the trade for a great many years, and of course I  
could not at this stage of the game remedy that condition.

470 Mr. CLARK. That is all.

Recross-examination by Mr. MOLLOY:

Q. In other words, everybody was doing the same thing?

A. Exactly, fair or unfair.

Q. And as everyone was doing the same thing, no one could charge the other as a disadvantage to themselves by doing it?

A. No; it is just following a general trade practice, without resort to any particular technical designation.

Mr. MOLLOY. That is all.

Mr. CLARK. That is, although it might perpetuate an injustice?

Mr. MOLLOY. I object to that question.

Mr. CLARK. Very well, I withdraw it.

A. My opinion in the matter would not matter very much, anyway.

(Whereupon, at 12.30 p. m., on November 18, 1920, the further hearing of this case was adjourned until November 26, 1920, at 9 a. m., Federal Trade Commission rooms, Washington, D. C.)

471 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION, COMPLAINANT,	} Docket No. 214.
<i>vs.</i>	
WINSTED HOSIERY COMPANY, RESPONDENT.	

473 HEARING ROOM,  
FEDERAL TRADE COMMISSION BUILDING,  
*Washington, D. C., Friday, November 26, 1920—9 a. m.*

Met pursuant to adjournment.

Before Examiner James McKeag.

Appearances: Mr. James T. Clark, for Federal Trade Commission; Mr. Melville J. France, 25 Broad Street, New York, for respondent.

474 PROCEEDINGS.

L. B. GREENBERG was called as a witness, and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Greenberg?

A. Clothing and furnishings.

Q. Where are you located?

A. At 811 Pennsylvania Avenue.

Q. Washington?

A. Yes, sir.

Q. Will you state briefly your experience as a merchant or as having been in other capacities in the business of men's furnishing goods.

A. I have been in the men's furnishings for the past 40 years—clothing and furnishings, buying and selling and advertising.

Q. Were you at any time a salesman?

A. Yes, sir.

Q. And handled underwear, among other things?

475 A. Yes, sir; for the past 40 years.

By Examiner McKEAG:

Q. You mean over the retail counter, to the consuming public?

A. To the consuming public.

By Mr. CLARK:

Q. And you have had supervision, too, of salesmen since?

A. Yes.

Q. And so you have come in contact with purchasers of men's underwear?

A. Yes.

Q. Have you in that time made observations which have given you an opinion as to the meaning of such terms, as applied to underwear, as "natural merino," "merino," "natural wool," "grey wool," and "Australian wool"?

A. Yes, sir.

Q. What is your opinion as to the understanding of the public, the consumers, of the term "Natural merino," as applied to underwear?

A. Would you want me to go into this thing elaborately?

Q. I would be glad to have you state it in your own way.

A. My own way?

476 Q. Yes.

A. Well, sir; a matter of 35 and 40 years ago the word "Merino"—

Mr. FRANCE. Just a moment. You have asked for an opinion. Should we not have the opinion first and the elaboration afterwards?

Mr. CLARK. Perhaps so. I will repeat the question, and perhaps he can answer it first more directly.

The WITNESS. I can answer it the way you want it, if you wish me to, but I want to cover this thing and do no one wrong and tell the truth.

Examiner McKEAG. I think that would give you a chance to cross-examine, Mr. France.

The WITNESS. If you will pardon me, I will take the tail first.

The word "Merino"—natural wool underwear—has been terribly abused.

Mr. FRANCE. I am going to ask that that be stricken out, if the examiner please.

Examiner McKEAG. The motion will be reserved for the commission.

477 The WITNESS. But I would say that while the merchant—I who buy this underwear, know what I am buying, because I am buying "Merino" underwear to-day, and for years past, of pure cotton; at the same time I know that—I do not think that any reputable merchant, knowing that fully (and he does know it) will offer that garment to the public as containing any wool. I know that.

By Mr. CLARK:

Q. "Merino," as I understand, is applied to all-cotton garments?

A. "Merino" means pure wool. The absolute definition of the word "Merino" means pure wool of a very fine fabric. It means a very fine fabric of pure wool. That is what the word "Merino" means.

Q. Our interest here particularly is as to what your opinion is, from your observation, as to the public's understanding of it.

A. The public's understanding is that only, sir, which a salesman behind my counters, who waits on the public, will tell the public. Now, I haven't a man in my establishment, nor would I tolerate it for a moment—if a customer asks, after the showing of that merino garment, "Is this wool?" he will be told invariably, "No, sir; there is not a particle of wool in this." There are some "Merino" 478 garments which have a finish, a wool finish, on top, but it is not. Now, that garment, the garment I am speaking of—I have it in my store to-day—used to cost \$4.50 or \$4.25 a dozen. It was a 50-cent garment. During the war time it has gone up as high as \$13.50.

Q. That is an all-wool garment?

A. No, no; all cotton.

Q. And what is the label on that?

A. "Fine Merino Underwear."

Q. Do you handle any of the Winsted Company's underwear?

A. Not knowingly. I may have some. No doubt I have some Winsted underwear in my establishment.

Q. You have in the past bought Winsted underwear?

A. Not direct from the firm; but it is a very good, honorable firm to do business with—a very good production.

Q. You display your underwear in the manufacturers' boxes on the shelves?

A. I do; yes, sir. Pardon me; manufacturers' or jobbers'. Each jobber that buys from the Winsted Company or any other company has the merchandise that he buys put up in different boxes, you know.

479 Q. And they may or may not vary?

A. May or may not vary; yes.

Q. Assuming that the boxes in which the Winsted Company pack their underwear contain the label, among other things, of "Natural merino," and their underwear is delivered to the jobber and to you in the original packages; aside from any instruction which your salesman may give a purchaser of underwear, what, in your opinion, is the impression or understanding which a purchaser coming into your store and seeing a box of underwear labeled "Natural merino" has as to the quality of that garment?

A. The true answer to that question as you propound it, sir, is that the public knows nothing. That is, I will qualify that by saying that the public does not know, five per cent out of the one hundred. They

ask to have it explained—what the contents are. It is the merchant who has more to do with it than the public.

Q. So the "Merino" has come to be a sort of question mark?

A. No. Merino, to one who understands it, is pure wool of the finest kind; but for years and years—I remember 35 or 38  
480 years ago, when the box was labeled "Fine merino" it was the finest kind of pure wool. To-day it is nothing but the purest of cotton. There is not a sign of wool in it.

Q. It is not applied solely to all-cotton garments, is it?

A. Well, I have never seen the word "Merino" applied to garments that have anything but cotton here of late years.

Q. Not to mixed wool and cotton goods?

A. No. Then there would be "Natural wool," and that is all cotton. I have to-day in my establishment merchandise that is marked "Natural wool," and it is the same as "Merino"—all cotton, not a sign of wool.

Q. It is a little hard, I think, to get an expression of just what you understand on the subject, and I would like to approach it in another way, subject to counsel's objection if he thinks it is improper. Are the terms "Natural wool" and "Natural merino" liable to be used to deceive the public in the hands of unscrupulous dealers?

A. Absolutely—

Mr. FRANCE. One moment. Have you finished the question, Mr. Clark?

Mr. CLARK. Yes, sir.

481 Mr. FRANCE. I object on the ground that that calls for a conclusion and opinion on the very thing which the commission is sitting to determine.

Examiner McKEAG. I think the question is highly leading. I think if you will word it another way it will remove that objection, and I will admit the answer subject to counsel's objection.

By Mr. CLARK:

Q. I understand you to say that the public, when it sees the term "Merino" on a box containing underwear, does not know what quality it means.

A. As a rule they ask the salesman who waits on them, "How much wool does this contain?" and therein, then, lies the guilt or the innocence of a storekeeper.

Q. Assuming that the purchaser is uncertain as to the meaning of the term, is it your opinion that he relies very largely on the salesman as to the character of the goods?

A. Yes.

Q. From your observation, do the salesmen know the facts as to the composition of these mixed or all-cotton goods that are labeled "Merino"?

A. Oh, yes. If they do not know, it is my duty to warn them; but as a rule they know.

482 Q. Aside from the conduct of your own business, have you had observation of the general methods of salesmen, of their

general character and intelligence, that would enable you to testify as to whether or not they correctly report the quality of such goods to the purchaser?

A. I believe that—

Mr. FRANCE. I think that is susceptible of an answer yes or no; whether he has any information.

Mr. CLARK. Yes.

By Mr. CLARK:

Q. I ask you if you have an opinion, from your observation, on that question.

A. I have, sir.

Q. Will you state it?

A. I know that at times a salesman, to effect a sale, when he is asked (in some stores, of course), will say—might say—"There is some wool in it," not knowing; but as a rule it can not be said, because that salesman knows by the cost price, if nothing else—the price of this garment that I just mentioned, a 50-cent garment—that it is all cotton. Although deception seems to be apparent, self-apparent, by the very fact of the name being on the box, the merchant  
483 knows that. But the customer does not know that, sir.

Q. How, in your opinion, has this uncertainty in the mind of the purchaser arisen as to the meaning of the word "Merino"?

Mr. FRANCE. I object to that as improper cross-examination of the witness. The witness has expressed such opinions as have been given here, and I do not think that the witness is qualified to enter into the workings of the purchasing public's mind, other than to express an opinion as to whether they think such a thing is wool or is not wool; not how they may arrive at that conclusion.

Examiner McKEAG. He may answer subject to your objection.

A. As a salesman I would like to portray to you how a person is served in that particular. A lady or gentleman, whoever it may be, will come into a store and say, "I would like to see some underwear." This is the general procedure which almost any merchant or salesman will vouch for: "What kind of underwear do you wish? Anything in woolen or cotton; two-piece or union suit?" "Why, I just want something cheap." Well, he will be shown a cotton ribbed garment, which, of course, is more self-apparent as to its being  
484 pure cotton than the merino. He says, "No; I would like to have something the natural color; I don't know what you call it;" and he will be shown a box of that "Merino" stuff, and he will say, "Yes, that is what I want; that is nice and soft." The question of cotton or wool may not come up at all, and does not for a fact come up more than perhaps five or eight times in a hundred, that a customer will ask that. The American public is that way. The American public will simply take that. They will say, "How much is that?" "Fifty cents," or 75 cents, whatever it may be. It has gone up to \$13.50 during this war; that same garment that they used to buy at \$4.25.

By Mr. CLARK :

Q. A dozen?

A. Yes, sir; it used to be a 50-cent garment. The other day I sold them as high as \$12. Just think what a loss that would be to me. But the public, they will take your word for it.

Now then, a woman may look at that and say, "No, I don't like that; I thank you very much," and go into another store. She is served by another man, who will finally show her that, and she will say, "Yes; I saw that in there; how much is that?"

485 Mr. FRANCE. Just a moment. I do not want to be captious—

Examiner McKEAG. It is cumbering the record unnecessarily. I think. I think you had better answer specific questions.

The WITNESS. Yes, if you please.

Mr. CLARK. I think I will ask you to answer differently, if you can. I will ask my original question, and the stenographer will repeat it.

(The stenographer read as follows:)

"Q. How, in your opinion, has this uncertainty in the mind of the purchaser arisen as to the meaning of the word 'Merino'?"

A. I should say mostly by the Government doubting it, or having had complaints of some sort, by examiners or something; I don't know. It may have been also by some public or—

By Mr. CLARK :

Q. "Uncertainty" really rather infers a change from a state of certainty.

Mr. FRANCE. I am going to object to that as argumentative.

Examiner McKEAG. I think that is argumentative.

486 Mr. CLARK. I withdraw it.

Examiner McKEAG. Off the record, Mr. Reporter.

(After discussion off the record:)

By Mr. CLARK :

Q. Do you recall an interview with you by a man representing the commission named Brownell recently?

A. I do, sir.

Q. You recall that interview, do you?

A. I do, sir.

Q. Do you recall stating to Mr. Brownell at that time that customers are misled by the branding of goods as "Natural merino"?

Mr. FRANCE. I object to that as improper cross-examination of the Government's own witness.

Examiner McKEAG. It is direct examination, not cross-examination.

Mr. FRANCE. Yes; it it is direct examination. I mean to say it is subjecting his own witness to cross-examination.

Examiner McKEAG. It is an improper method of examination, in my opinion; highly improper.

Mr. CLARK. Off the record.



(After discussion off the record:)

487 Mr. CLARK. It is the liberty of the examiner to bring out the truth. I suggest that you ask him some questions.

By Examiner McKEAG:

Q. Mr. Greenberg, assuming an average buyer coming into a gent's furnishing store and seeing a label upon a box of underwear, "Merino," without anything being said, has that buyer an understanding as to whether or not that underwear is made of all wool or part wool or all cotton, in your opinion?

A. That buyer knows nothing in the majority of instances.

Q. Are there any buyers, without being informed, of the impression that it is an all-wool garment, from your experience.

A. That would be only himself, who would know what merino is—

Q. I am talking about the average buyer who comes in.

A. The retail purchaser?

Q. The retail purchaser who goes into the store to buy for himself.

A. I will again say, sir, that the majority of them do not know what it is.

488 Q. No; I mean, are there any buyers—not the majority, but are there any buyers who will be under the impression that it is all wool?

A. No, sir; not in years and years past.

Q. Are there any buyers who will be under the impression that it is composed of partly wool and partly cotton?

A. By the feeling thereof, they would be, yes; unless they are told by a reputable business man what it is, if they ask. But the owner, himself—it is against him that this is practiced.

Q. If a salesman tells the prospective customer that this garment which is labeled "Merino" or "Natural Merino" is an all-wool garment, will the purchaser believe him?

A. Not if he knows anything at all.

Q. Will there be any buyers or consumers that will believe him?

A. No, sir; because it is all cotton.

Q. Then it is not possible for the salesman to deceive the purchaser?

A. The salesmen in some stores may go to this extent—that is what I am trying to bring out—

Q. But will he believe him? That is the point. Will  
489 the buyer believe the salesman when he says it is an all-wool garment?

A. Why, some may; I doubt it.

Examiner McKEAG. Continue, Mr. Clark.

Mr. CLARK. I am through. That is all.

Cross examination by Mr. FRANCE:

Q. Mr. Greenberg, you now conduct a men's clothing and furnishing store in the city here?

A. Yes, sir.

Q. Do you mind telling me who are the manufacturers of the garments which you say are branded "Merino" which you have, which are all cotton?

A. I could not say, sir. I could not mention the names, because I deal mostly with jobbers.

Q. Is there anything at all on those garments to indicate who manufactures this all-cotton garment which you say is stamped "Merino"?

A. No, sir.

Q. Is it not a fact, Mr. Greenberg, that in the trade (and when I say "in the trade," I mean in the underwear trade) "Merino" means a garment composed of cotton and wool combination?

490 A. No, sir; not to my knowledge. Merino is pure wool.

Q. You have said that the definition of "Merino," as you understood it, was pure wool. Now, if you found in standard dictionaries that it had another meaning, to wit, in the underwear trade, a garment made of wool and cotton, would that alter your opinion as to whether or not "Merino" means all wool?

A. Well, I could not be convinced as to that, because my knowledge of the word "Merino" means pure wool of a very fine nature. A merino fabric means a pure woolen fabric.

Q. Applied to the underwear trade—and that is the sole thing that we are discussing this morning—it is your understanding that in the trade "Merino" does not mean a mixture of cotton and wool?

A. Yes, sir.

Q. How long have you been in the business; 40 years, you say?

A. Forty years; yes, sir.

Mr. FRANCE. That is all.

(Witness excused.)

491 STANLEY LANSBURGH was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Lansburgh?

A. General department store.

Q. Where?

A. 420 to 430 Seventh Street.

Q. How long have you been in that business?

A. Fifteen years.

Q. What is your present relation to the business; in what capacity?

A. One of the stockholders, and interested in the general management, and in the buyership of some departments.

Q. Have you had experience in the handling of men's underwear, as salesman?

A. Not of recent days.

Q. But in the past?

A. In the past; yes, sir.

Q. About how long was that experience?

A. Probably 8 to 10 years.

Q. In Washington?

492 A. Yes, sir; right where I am.

Q. And have you since that time had supervision of the underwear department in any store here in Washington?

A. In our store, sir; in my own store.

Q. And during both these periods, as salesman and as superintendent you have come in contact with the purchasing public and have had observation of the purchasing by the public of underwear?

A. Not so much since I have been buying as previous to that.

Q. But previously as salesman you did have that experience?

A. Yes, sir.

Q. As salesman you were familiar with the lines of underwear which the house carried?

A. Yes.

Q. They were purchased from various American manufacturers?

A. Yes, sir.

Q. Did you handle any all-wool garments?

A. What was commercially known as all wool.

493 Q. What was it in fact, if you can say, as to its contents of wool and cotton?

A. Why, it was always told to us by the manufacturer to be 85 to 90 per cent Australian wool. That garment we have not had for some time.

Q. Have you at any time handled the Winsted Company's underwear?

A. Yes, sir. We are handling it to-day, sir.

Q. And you are familiar with the labels under which it puts out its product?

A. Yes, sir.

Q. You handle that company's goods on your shelves in their boxes?

A. Yes, sir.

Q. And you are familiar, then, with the labels on those boxes, such as "Natural merino" and "Gray wool"?

A. Yes, sir; "Natural wool."

Q. "Australian wool"?

A. Yes, sir. The Australian wool I don't remember of having seen.

Q. From your experience as salesman and superintendent of the underwear departments, have you an opinion as to the under-  
494 standing that the public has of the term "Natural merino" as applied to underwear?

A. I don't think they—

Q. Have you an opinion?

A. Yes. I have always figured that the public felt that merino was a mixed wool and cotton garment.

Q. Is that true as to all of them?

A. As to all merino garments?

Q. No; as to all purchasers.

A. Well, I would not say that. I think quite a majority of them feel that way. A great deal of confidence, though, is placed in the talk that is given by the salesman as to what is in the garment, and we endeavor in that way to have the salesman give the right information to the customer.

Q. What do you think is the understanding of the salesman, as a rule, as to the term "merino"?

A. Well, I don't think any salesman of any ability at all, or any knowledge, thinks that a garment is all wool.

Q. That is called "merino"?

A. Yes. They should be trained differently, in fact, when the garment comes in the house, by the manager of the department, and told what is in a garment, in order to talk to a customer.

495 Q. You say that the buyer depends a good deal on the information of the salesman, and that the salesman should be instructed?

A. Yes, sir.

Q. To tell purchasers that goods marked "merino" are not all wool?

A. Yes.

Q. Is it not a fact that numbers of the public, when they see that label, have the impression that it is all wool?

Mr. FRANCE. One moment. I object to that as leading, extremely, under the circumstances.

Examiner McKEAG. The witness may answer the question subject to your objection.

The WITNESS. Let me have the question, please.

(The question was repeated by the stenographer as above recorded.)

The WITNESS. I don't think so. I don't think that the public take especial notice of that label. I don't think they come in close enough contact with it. I think that the clerk behind the counter comes more in contact with it than the customer.

496 By Mr. CLARK:

Q. From your observation of the intelligence and honesty of salesmen, are the terms "Merino" or "Natural merino" or "Natural wool" ever represented to mean all wool?

A. I can not speak for other stores, but in our place we won't allow them to be.

Q. Do salesmen, as a rule, earn according to their amount of sales?

Mr. FRANCE. I object to this as immaterial and irrelevant to this hearing.

Examiner McKEAG. I will permit him to answer subject to your objection.

By Mr. CLARK. In other words, is the pay of salesmen based partly or wholly on the amount of sales they make?

A. Yes; naturally on their salesmanship, powers of salesmanship, and also they are given a bonus. We have a bonus system, like all stores have to-day.

Q. And that bonus depends upon the extent of their sales?

A. Yes; over and above the amount necessary—their quota—to meet the requirements of the salary they get.

497 Q. Have you ever know the term "Merino" to be applied to all cotton goods?

A. I was thinking about that, and it strikes me that I remember—we haven't handled the garment lately, but there used to be a medium weight garment marked "Merino" which was all cotton. I can't remember the garment; I can't recall who made it. It has been about three years since we handled it. It might be still around the market; I don't know. We stopped handling it because there is no demand for that class of merchandise to-day. That garment used to sell for 50 cents.

Q. You have been a buyer, have you, of underwear?

A. Yes, sir.

Q. And of other goods in which wool is a part?

A. Yes, sir—no, not of other goods; only the underwear.

Q. What, in your understanding, does the term "Merino" mean?

Mr. FRANCE. That is applied, of course, to the underwear trade, Mr. Clark?

Mr. CLARK. No; independent of any trade meaning.

498 Mr. FRANCE. I object to it, unless it is limited to the subject which is under discussion here, to wit, underwear.

Examiner McKEAG. It might have some historical bearing, though. I will permit him to answer subject to your objection.

A. Merino, as I understand it, is a very fine wool of the merino sheep. Personally I do not feel that when a garment is marked "merino" it is pure merino. The fact is, I can come pretty close to telling whether the garment has cotton in it by feeling it.

By Mr. CLARK.

Q. Can you tell the percentage of wool and cotton in the garment?

A. No, sir.

Q. Can your salesmen?

A. No, sir. We instructed them not to. If the customer asks, we say, "Part wool; we can not guarantee it; we believe it to contain so-and-so much wool."

Q. Such a percentage?

A. Yes, sir; and we make it very conservative. We try to; that is, we instruct our salesmen to do it.

499 Q. From whom do you get your information, as far as it goes, as to the quantity of wool or cotton?

A. Why, the information is generally gotten from the office of the company, or from the salesman who sells the merchandise.

By Examiner McKEAG:

Q. You mean the manufacturer's salesman?

A. Yes; the manufacturer's salesman; that is, as near as he can give it. That is what we have to go by.

Mr. CLARK. I think that is all.

Cross-examination by Mr. FRANCE: I did not get the name of your corporation, Mr. Lansburgh.

A. Lansburgh & Brother.

Q. In the underwear trade, outside of this one particular instance that you have mentioned, where there was a garment sold for 50 cents which was marked "merino" and which was all cotton—eliminating that one instance—"merino" has always meant, in your experience and knowledge, a garment made of cotton and wool?

A. Yes. I believe that the majority of the public feel that way, too.

Mr. FRANCE. That is all, Mr. Examiner.

(Witness excused.)

CARLTON L. CRYMES was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Crymes?

A. I am head clerk to the auditor of passenger accounts of the Southern Railway Company, and I conduct a dry goods and men's furnishing store at 2742 Fourteenth Street.

Q. In your store you deal in men's underwear?

A. Yes, sir.

Q. Have you had experience in the past as a salesman of underwear?

A. Not until I bought the store seven years ago.

Q. And you now take part in the selling of your goods?

A. I do; yes, sir.

Q. You have, in your experience, since you bought the store—

A. (interposing). Well, previous to the time of buying the store I helped my brother-in-law, Mr. A. R. Swann, for probably two years, several nights a week, one or two nights, and in that way I became familiar more or less with merchandise.

Q. So that you dealt with the public over the counter in the sale of underwear?

A. I have; yes, sir.

Q. For a number of years?

A. Yes, sir.

Q. And you have purchased underwear from different American manufacturers?

A. Well, our underwear that we sell is bought mostly through the jobber and not direct from the mill.

Q. But you have bought from jobbers representing different American manufacturers?

A. Yes, sir.

Q. And are the goods, namely, underwear, delivered to you in boxes labeled in different ways, such as "natural merino," "natural wool," "gray wool," and "natural worsted?"

A. Yes, sir. We have a garment known as the Calvert Mills, which is the trademark of Johnson, Boyd & Company in Baltimore; that is the Calvert Mills, and their brand is "Natural Merino." It is not supposed to be a wool garment, and is sold for probably 50 to 75 cents in normal times, although at the present time the price is \$1.50, under the present market conditions.

Q. Do you understand that there is any wool in that garment?

A. No, sir.

Q. It is all cotton?

A. It is all cotton; yes, sir.

Q. That stands on your shelves labeled "Natural Merino?"

A. Yes, sir.

Q. Do you deal in the Winsted Company's garments?

A. Not that I know of, unless they come to me with the brand of the jobber on the boxes. I have no goods labeled Winsted.

Q. Have you any other goods besides the Calvert goods labeled "Merino," or "Natural Merino," or "Natural Wool," or with labels similar to those?

A. We have the Glastonbury. That is labeled "Natural Wool," and we sell it for all wool, because there is no reason to believe that it is not wool.

Q. What is your understanding, as a retailer, of the term "natural merino" as applied to underwear?

503 A. Well, my idea about "merino" is that it suggests wool.

I don't know just what the exact definition of it would be, but my understanding is that "merino" suggests wool in the garment.

Q. And from your experience in contact with the public, in their purchase of underwear, what is your understanding of the public's understanding of the term "Natural merino"?

A. Well, I believe that they would consider wool being in that garment by using the name "Natural merino" when selling it to them.

Q. That it was all wool?

A. Not all wool; no; but they probably believe that it is partly wool, although at the price that that garment is sold nobody would expect it to be a wool garment.

Q. You say some of your goods labeled "Natural merino" or "Natural wool," in the case of the Glastonbury goods, are, as a fact, mixed cotton and wool?

A. Well, we believe them to be all wool—the Glastonbury.

By Examiner McKEAG:

Q. That is labeled "Natural wool"?

A. "Natural wool," it is labeled on the box.

By Mr. CLARK :

Q. And you sell them for all wool?

504 A. We do the Glastonbury; yes, sir.

Q. And the Glastonbury goods are displayed on your shelves in boxes labeled "Natural wool," are they?

A. Yes, sir.

Q. And when the customer comes in and asks for underwear, you take your boxes off the shelves and show him the contents?

A. We do.

Q. To your knowledge, from your experience, do any customers when they see the label, "Natural merino," understand or assume that it is all wool?

A. I believe they think it is a wool garment at first, because the appearance of it would lead you to believe so. It has every appearance of being a wool garment. It comes in a gray and a white—or a cream, you might call it—and anyone would think it was a wool garment unless they were told that it was not; that is, a person not familiar with merchandise.

Mr. FRANCE. Is it improper to ask here whether he means by that all wool or a combination of wool and cotton?

Mr. CLARK. Go ahead.

505 The WITNESS. Well, the public as a rule don't think about a combination of cotton and wool. They will either say, "Is this wool?" and you can tell them "No," or sometimes you can tell them it is a wool garment, or cotton, or silk, which we sometimes have in ladies' wear and infants' wear. But with the men's goods they will believe it is wool unless you tell them that it is not. But they very seldom ask if it is a combination of cotton and wool.

By Mr. CLARK :

Q. Do you employ clerks?

A. Yes, sir.

Q. What do you understand to be their impression as to the term, "Natural merino," when they sell goods so labeled?

A. My clerks understand that this garment is not a wool garment, or does not contain any wool, and they sell it as such. They do not sell it with the understanding, or try to deceive the customer, that there is any wool in it.

By Examiner McKEAG :

Q. Do you handle any other garments aside from this Calvert stuff that are marked "merino" or "natural merino"?

A. That is the only one.

Q. Have you ever sold any other kind?

A. No, sir; not marked "merino."

By Mr. CLARK :

506 Q. What do you understand by the term, "Natural wool?" Examiner McKEAG. He has already explained that.

A. "Natural wool," I should say, would be the genuine wool from the sheep, without any mixture of cotton.



By Mr. CLARK:

Q. And "Australian wool?"

A. Australian wool, I believe, is simply a different brand of wool from that which we raise in this country, and it is supposed to be a finer grade of wool than the American wool.

Q. What do you understand by the term "Gray wool" as applied to underwear?

A. "Gray wool," I should say—I don't know just what would produce gray wool; whether it is dyed or whether it is dark sheep.

Q. But as to its meaning all wool or not, does it mean an all-wool garment, to your mind?

A. The gray?

Q. Yes; the "Gray wool."

A. It would; yes, sir. I should say it would mean all wool.

Mr. CLARK: I think that is all.

507 Cross-examination by Mr. FRANCE:

Mr. Crymes, the public, as you have come in contact with them, depend largely on the salesman to determine what kind of a garment they get?

A. Very much so. You can deceive a customer if you want to.

Q. And if a salesman tells a purchaser that a garment is all wool, the purchaser, ordinarily, relying on the salesman, will accept his verdict?

A. Yes, sir; and in turn we depend very much upon the drummer of the house that sells us these articles, whether a thing is wool or not. We take their word for it.

Q. You do not sell, do you, a very large percentage of all-wool garments?

A. Not much—it is too high.

Q. And the great majority of your sales are a combination of wool and cotton?

A. Wool and cotton; yes.

Q. And they are so represented by you when you sell them?

A. They are. They are principally cotton.

Q. And the only contact that you ever had with the word "Merino," you say, is with this garment that is manufactured  
508 by the—is it the Calbert or Calvert?

A. Calvert—C-a-l-v-e-r-t.

Q. The Calvert Mills, in Baltimore.

A. Well, that is a trade-mark of Johnson & Boyd, the jobbers. You see, a jobber will contract with a mill for so many thousand dozen and put his own trade-mark on it.

Q. Johnson & Boyd?

A. Johnson & Boyd; yes, sir.

Q. And other than that you have had no contact with this word "Merino?"

A. I think not; not that I know of.

Q. You never saw a garment that was sold and represented to be a pure merino wool?

A. Nothing but the Glastonbury, and that is only labeled "Natural wool."

Q. But did you ever see a garment—underwear—labeled "Merino wool," meaning an all-wool garment?

A. I don't know that I have; I think not.

Q. You have never sold one?

A. No, sir.

Mr. FRANCE. That is all.

509 Redirect examination by Mr. CLARK:

Q. In relation to the Glastonbury, which you say is labeled "Natural wool," if a customer raises any question as to the representation which I understand you to say you make, that it is all wool, how do you seek to establish that?

A. Well, we try to convince them by the label on the box. That is the only way we have. Of course, everybody is not expert in cloth and can't tell positively whether it is wool. I might not, and lots of other people experienced in selling garments can't tell whether it is all wool, and you have got to rely on the label on the box and its truthfulness to guide you as to whether you are correct or not. With hosiery, lots of hose come in that, instead of being labeled "Wool" will be labeled "Cashmere," which leads you to believe that it is Cashmere wool. Cashmere is a form of wool. But whether they are wool or not we can not say. We never tell a customer a Cashmere hose is a wool hose.

Q. So you rely on the manufacturer's label?

A. The manufacturer's label; yes, sir.

Q. And you show that to the purchaser in confirmation of your statement?

510 A. That is right; yes, sir. We do not conduct any special sales, and all our goods are sold directly from the original box. We never mix two articles together. We always have the original box to show the customer what we are selling him.

Mr. CLARK. That is all.

Recross-examination by Mr. FRANCE:

Q. In buying from your jobber or from the manufacturer you obtain from him, do you not, the percentage of wool or cotton which is in a garment?

A. We seek to; yes, sir; when we buy.

Q. And he gives it to you, does he not?

A. Yes, sir. He will tell you it is half, three-fourths, or all.

Q. And when you sell, you or your salesmen indicate that same percentage which has been given to you by the manufacturer, to the purchaser?

A. Yes, sir. We rely entirely upon what is told us. As I say, everybody is not an expert in material.

Q. So that if your jobber sells you a garment which he says is 60 per cent wool and 40 per cent cotton, when you sell it you  
511 represent it to your customer as being 60 per cent wool and 40 per cent cotton?

A. That is right.

Q. Mr. Crymes, have you still on your shelves, and do you still get, this Calvert brand of garments, marked "Merino?"

A. We bought it last season, but did not buy it this season.

Q. Do you know whether it is still sold?

A. I think so. I am not positive, but I think it is. We did not replenish this year.

By Mr. CLARK:

Q. You have no way of confirming, yourself, the information given you as to the percentage of wool or cotton in a garment?

A. Do you mean could I identify the salesman, and so forth?

Q. No; I mean determining for yourself, independently?

A. No, sir; positively we have none. You can often detect wool in a garment by the feel, and know there is some wool there, but the quantity you can not.

Q. That is, in the case, for instance, of the Glastonbury's garments labeled "Natural wool," you do not know of your own knowledge—that is, from your own investigation and analysis of the  
512 garments—whether they are all wool or not?

A. No, sir; but I wore a suit one time and I decided it was. I had to take it off.

Q. Will you state the cost of that particular garment?

A. Well, we did not buy any of the Glastonbury this season. Last season I think we retailed it for about \$3.50—not a suit—that would be \$7 for the suit—and it cost us, I think, about \$30.

Q. A dozen?

A. It did at that time. It cost us about \$30 or \$32.50 a dozen. That is my understanding.

Q. How did that compare with the price of mixed cotton and wool underwear—say 75 per cent wool—of other makes?

A. Seventy-five per cent wool would be more than half of that price—I couldn't say just what. You would strike an average somewhere between half that price and the entire price. Probably \$23.50 for a garment that contained 75 per cent wool.

Q. Are you now recalling specific instances?

A. No, sir; I am not. I am giving the general idea.

Q. That is what I want to know.

A. I have not my price marks with me, and I can't recall.

513 Q. So that statement was only an estimate?

A. That is just an estimate.

Q. Of what such garments should cost?

A. Should cost.

Q. On the supposition that the "Natural wool" garment of the Glastonbury was all wool?

A. Yes, sir.

Mr. CLARK. I think that is all.

By Mr. FRANCE:

Q. Did you ever have a customer, in your experience, ask for a merino garment, indicating that he expected an all-wool garment?

A. Well, I can not say that I have. When you show them this garment, as I have previously stated, the first question they will ask is "Is it wool?" because it has every appearance of being wool. But they will never ask—when they want a wool garment they will not ask for a merino garment. They will ask you outright for a wool garment.

By Mr. CLARK:

Q. You now refer to the cotton garment?

A. The cotton garment; yes, sir.

By Mr. FRANCE:

514 Q. But you never heard a customer who wanted a wool garment ask for a merino?

A. I think not; no, sir.

(Witness excused.)

SIDNEY H. REIZENSTEIN was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Reizenstein?

A. I am a merchant in haberdashery and clothing.

Q. How long have you been dealing in men's goods, including underwear?

A. About 25 years.

Q. And have you, during that time, been in the capacity of salesman?

A. Yes, sir.

Q. And what are your present duties?

A. Well, now I am a buyer, you might say. I run the establishment. Of course, I do not sell as much merchandise as I used to; very little.

Q. But you have supervision of the merchandising of underwear?

515 A. Yes sir.

Q. Do you handle the Winstead Company's underwear?

A. We have not for a long time.

Q. But you did formerly?

A. We handled some of their numbers; yes.

Q. But you buy underwear from various American manufacturers?

A. Yes, sir.

Q. And such goods are delivered to you through the jobbers in the manufacturers' packages?

A. Yes.

Q. Labeled in various ways?

A. Yes, sir.

Q. And you sell from those packages?

A. Yes, sir.

Q. And the boxes of the manufacturers containing the underwear stand on your shelves?

A. Yes, sir.

Q. You have become familiar with the labels placed on the boxes containing underwear by various American manufacturers?

A. Yes, sir.

516 Q. Including the terms "Merino" and "Natural merino?"

A. Yes.

Q. "Natural wool"?

A. Yes.

Q. "Gray wool"?

A. Yes.

Q. "Australian wool"?

A. Yes.

Q. "Natural worsted"?

A. Yes, sir.

Q. What is it, in your opinion, from your observation of the buying public in purchasing underwear, that an intending purchaser understands when he sees the term "Natural merino" on one of these boxes?

A. Well, of course those things are pretty hard to tell, but it may give the purchaser the impression that the garment is all wool; but handling underwear as long as I have, and so forth, those names have become commercial names. We get in underwear as "Natural wool" and of course we sell it as "Natural wool," but it is not an all-wool garment. The all-wool garment is almost off the market

517 nowadays. I don't believe there is any made. There may be; and my idea is that the remedy for that is——

MR. FRANCE. I object to this, if the examiner please. I do not believe the witness' recommendation as to a remedy is a proper answer to the question as put.

Examiner McKEAG. No. Just give your experience.

The WITNESS. Well, my real experience of it is, of course, as I said before, that it is a sort of commercial name, and we sell the garment as "Natural wool," but we know it is not natural all wool, and I do not think the purchaser expects it to be natural wool, because the price of an all-wool garment is almost prohibitive.

By MR. CLARK:

Q. Have you known of the term "Merino" being applied to an all-cotton garment?

A. I don't think—I never experienced that, because as a rule we handle a little better grade of stuff. But, for instance, underwear often comes in and it is marked "Australian wool." Now, there is

no doubt in my mind that there is some Australian wool in there, but the percentage is rather small. But still the manufacturers have been doing that with a clear conscience, because they have been doing it all the time, you see. It is just a sort of commercial label.

Q. You make a distinction between the trade's understanding of these terms and the public's?

A. Yes.

Q. What, then, do you think the trade understands by the term "Merino" as applied to underwear?

A. Well, I really think that the trade thinks there is a mixture. If a customer comes in and asks me, or asks one of our salesmen, "Is there cotton in this garment?" he would say "Yes."

Q. Now, as to the consumer before he reaches that point of asking that question of the salesman, do some customers, when they enter a store and see the word "Merino," understand that it means other than cotton and wool?

Mr. FRANCE. I think the question is leading, and I think Mr. Clark should put these questions other than in leading form to the witness.

By Mr. CLARK:

Q. What is the impression?

A. My idea of it is, I don't think the public thinks they are buying an all-wool garment.

Q. You have been buying woolen or cotton and wool garments, I suppose, for a good many years?

A. Yes, sir.

519 Q. What is your understanding as to the meaning of the term "Merino" as applied to wool, as distinguished from the manufactured article?

A. Well, in the technical form, when they say it is merino underwear, a person would imagine it was all merino underwear.

Q. Of what grade?

A. Well, of course, that is what makes the grade of underwear, is the mixture of cotton and wool.

Q. I meant as to the grade or quality of the wool.

A. Of course, my idea on that is that the garment that is all wool is the most expensive, and then the mixtures come down. If a garment is 75 per cent, it is the next price; if it is 50 per cent, it is the next price; if it is 25 per cent, it is the next price. Of course, it is very hard to tell how much wool there is in underwear. The only person that really knows is the man that weaves the cloth.

Q. You can not tell by your personal examination?

A. I could not tell; no.

Q. And the salesman cannot?

A. No, sir.

520 Q. Nor the customer?

A. No, sir. That is my idea. Some people may think they can, but I don't think there is a person living who can pick out a

garment and tell you what percentage of wool there is in it. Of course, you could give it a test and tell it.

Q. So, in your opinion, does the customer depend finally on the statements made to him by the manufacturer in the form of these labels, largely?

A. He does in a general way; but the trade has been doing this as long as I have been in business, using these commercial terms, as "natural wool." They have never done anything else, and I really think that the trade in general is under the impression that they are not getting an all-wool garment.

Q. The trade?

A. Yes, sir; and the purchaser—the consumer.

Q. That is the point.

A. Because you know, an all-wool garment has its bad features. An all-wool garment will shrink so terribly; it won't give satisfaction.

521 Q. Now, assume a case of a dishonest salesman, if such exists, and the existence, in the store where he is acting as salesman, of underwear in boxes labeled "Merino." In your opinion, is the state of the public's mind such as to the meaning of that term that it lends itself to a misrepresentation, in the case of the sale of mixed cotton and wool goods, that the goods are all wool?

Mr. FRANCE. I object to that as incompetent and irrelevant. That is the question which is up for determination before the commission.

Examiner McKEAG. He is asking, in substance, if a retail clerk tells the customer that one of these "merino" garments, made of a mixture of cotton and wool, is all wool, will the customer believe it?

Mr. FRANCE. If that is the question—

Examiner McKEAG. That is the question as I understand it.

Mr. CLARK. It is not exactly the question. The point is whether the label assists him in putting over that representation.

Mr. FRANCE. I object.

Examiner McKEAG. The witness may answer subject to your objection.

522 Mr. CLARK. Read the question.

(The stenographer read as follows:)

"Now, assume a case of a dishonest salesman, if such exists, and the existence, in the store where he is acting as salesman, of underwear in boxes labeled "Merino." In your opinion, is the state of the public's mind such as to the meaning of that term that it lends itself to a misrepresentation, in the case of the sale of mixed cotton and wool goods, that the goods are all wool?"

A. I do not think so; because in a good many cases a customer will come in and see some of this underwear displayed, called "natural wool," and very frequently the customer will ask, "Is this all wool?" and always the salesman will say, "No." Now, there was quite a case here last year, in this Fair Price League of New York—Goldenberg; I don't know whether you have heard of the case or not.

Mr. CLARK. Yes. We will not go into that. We do not want to cumber the record.

The WITNESS. It was very similar to this. Of course, the merchant was exonerated there by a jury trial.

523 Mr. CLARK. I am perfectly willing to have that appear. I do not think your answer really is quite responsive to my question.

The WITNESS. Let us have the question again, then.

Mr. CLARK. I will attempt to state it.

Mr. FRANCE. I am going to object, because I think he did answer it. If you will take the first part of the witness's answer, it was very specific. May I have the first part of that answer read?

(The stenographer read as follows:)

"A. I do not think so; because in a good many cases a customer will come in and see some of this underwear displayed, called 'natural wool,' and very frequently the customer will ask, 'Is this all wool?' and always the salesman will say, 'No.'"

Mr. CLARK. The first part of his answer is, of course, qualified—

Examiner McKEAG. Let us have no argument on that.

Mr. CLARK. I want to bring out the reason that his answer is not responsive.

Examiner McKEAG. Ask your question, and do not argue with Mr. France about it.

Mr. CLARK. Mr. France will take care of that.

524 By Mr. CLARK:

Q. I assume the case of a dishonest salesman, who would not reply honestly to a question which the consumer, as you say, might ask as to whether the goods were all wool; and I ask if the presence of the label "Merino" on the box in which the goods are sold would assist a dishonest clerk in misrepresenting that a mixed cotton-and-wool garment was all wool?

A. Well, that may assist him, yes; but it would be very far-fetched that a customer would expect an all-wool garment. But, as you stated there, sure, it may assist him.

Mr. CLARK: That is all.

Cross-examination by Mr. FRANCE:

Q. Mr. Reizenstein, all-wool garments in your experience are so marked, and are sold as all wool, are they not?

A. Yes, sir.

Q. In your experience with the public, in the sale of underwear, the only garments which you have sold to the public as all wool are garments which are specifically marked "All wool"?

A. As a rule; yes.

525 Q. You receive from the manufacturer or from the jobber the percentage of wool which is in your garments, do you not?

A. Well, we do at times; yes. When we inquire, we do.

Q. What percentage of all-wool garments do you sell? It is very small, is it not?



A. None.

Q. And you depend in your business, as most other people do, upon the integrity of the manufacturers and jobbers with whom you deal, do you not?

A. Absolutely.

Q. And if you found a manufacturer or a jobber who misrepresented his goods as to their wool content, you would cease your connections with him?

A. Yes.

Q. And the figures that you give, if they are asked for by your customers, are the figures that you received from manufacturers from whom you bought?

A. Yes.

Q. And you have faith in their integrity, and you pass those figures on to your customers?

A. Absolutely.

Mr. FRANCE. That is all.

526 Redirect examination by Mr. CLARK:

Q. You know, do you not, that there are manufacturers of all-wool underwear?

A. Well, yes; there is some all-wool underwear, I think.

Mr. CLARK. That is all.

(Witness excused.)

Examiner McKEAG. Have you any more witnesses, Mr. Clark?

Mr. CLARK. That is all we have until this afternoon.

Examiner McKEAG. We will adjourn until 2 o'clock.

(Thereupon, at 11:45 o'clock a.m., a recess was taken until 2 o'clock p. m.)

527

AFTER RECESS.

The hearing was resumed, pursuant to the taking of recess, at 2 o'clock p. m.

ISIDOR LAWRENCE GOLDHEIM was called as a witness in behalf of the commission, and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Goldheim?

A. Men's wear, consisting of clothing, haberdashery, and hats.

Q. Where?

A. Fourteenth and New York Avenue.

Q. How long have you been in that business?

A. About 20 years.

Q. Have you had experience during that time as salesman of men's furnishing goods, including underwear?

A. I have.

Q. About what period would that experience as salesman cover?

A. About a like period.

Q. In your business you have purchased underwear from various American manufacturers?

528 A. Yes, sir.

Q. And you have observed the labels which they place on the boxes in which they deliver their goods to the jobbers?

A. I have.

Q. And some of those labels are: "Merino," "Natural merino," and "Natural wool," "Natural worsted," and "Gray wool"?

A. Yes, sir.

Q. In the experience which you have outlined, have you come in contact with the purchasing public in its search for underwear? I suppose you have come in contact with the purchasing public in selling goods and in the management of the underwear department?

A. Yes.

Q. Have you formed an opinion as to the understanding of the public of those terms as applied to underwear? Just answer that yes or no.

A. I have, sir.

Q. Assuming that the term "Natural merino" is applied by the manufacturers to garments made of cotton and wool, in your  
529 opinion is the purchasing public, or any part of it, misled by those labels as to the mixed character of those goods?

A. I don't remember ever seeing a box labeled "Cotton and wool."

Q. Perhaps I did not put my question clearly. When the purchasing public enters a store and sees on the shelves boxes labeled "Merino," what, in your opinion, is their impression as to the character of garments in that box, as to whether they are all wool or mixed wool and cotton?

A. I should say the average unintelligent man would think he was buying wool garments, sir.

By Mr. FRANCE:

Q. Did you say the average unintelligent man?

A. Yes, sir.

By Mr. CLARK:

Q. What would you say as to the label "Natural wool"? Would you say the same thing?

A. No. That would be a misleading label, too, in my mind.

Q. What about the term "Australian wool," as applied to mixed woolen and cotton garments?

A. Absolutely misleading.

Q. How about "Gray wool"?

530 A. Likewise, sir.

Q. And "Natural Worsted"?

A. Just as misleading.

Q. Can you state, from observation and experience, whether or not it is a fact that such labels, as applied to mixed cotton and woolen garments, are used in aid of the representation by some dealers that the goods are all wool, whereas they are not?

MR. FRANCE. Just one minute, before you answer that. I want to enter an objection to that on the ground that this witness is not qualified to speak on that, for one thing; and in the second place, I think it is a question which is for determination by the commission, and not by this witness.

Examiner McKEAG. He may answer, subject to your objection.

MR. CLARK. Will you read the question, please?

(The reporter thereupon read the question referred to, as follows:)

By MR. CLARK:

“Q. Can you state, from your observation and experience, whether or not it is a fact that such labels, as applied to mixed cotton  
531 and woolen garments, are used in aid of the representation by some dealers that the goods are all wool, whereas they are not?”

By MR. CLARK:

Q. You can answer that yes or no.

A. Yes.

Q. Will you state?

A. I will.

MR. FRANCE. The same objection.

Examiner McKEAG. Same ruling.

The WITNESS. The unscrupulous merchant does not hesitate to assist his customer, to the extent of explaining to him that this garment is labeled “Natural wool,” or “Gray wool,” meaning that “natural wool” would be an undyed process, and gray wool, a dyed or partly dyed process, etc. He is anxious to make the sale. The probabilities are he, in his own ignorance, does not know the difference. The consequence of it is that the average man entering a shop of that character could be deceived very easily, and I presume is.

By MR. CLARK:

Q. That applies to the term “Natural merino,” as well as the others?

A. The term “Natural merino,” to me, of course, implies just exactly what it is. It is an undyed wool. But the word  
532 “merino” would mean to me all wool, if there was no clause after it “part cotton” or “cotton and wool.”

Q. And, if applied, like these other labels which you have mentioned, to cotton-and-wool goods, could it be, in your opinion, used as an aid in the representation that the garment was all wool?

MR. FRANCE. I object to that, as already having been gone over.

MR. CLARK. I did not include that particular term in my former question.

By MR. CLARK:

Q. Did you get the question?

A. No; repeat it, please.

(The reporter thereupon read the question referred to, as follows:)

By Mr. CLARK:

"Q. And, if applied, like these other labels which you have mentioned, to cotton-and-wool goods, could it be, in your opinion, used as an aid in the representation that the garment was all wool?"

By Mr. CLARK:

Q. That refers to "Natural merino."

A. I would say the same thing with regard to "Natural merino."

533 Q. Are you connected with any association of retailers here?

A. I am, sir.

Q. In what capacity, sir, and what is the name of the association?

A. I am president of the Maryland and District of Columbia Clothiers and Haberdashers.

Q. Do you handle any all-wool garments?

A. No, sir.

Q. Do you know of the term "Merino" as being applied, in fact, to all cotton goods?

A. It never was my supposition that it was.

Q. Is it a fact that there are manufacturers of all-wool underwear in this country?

A. Not to my knowledge.

Mr. CLARK: That is all.

Cross-examination by Mr. FRANCE:

Q. Then you sell no American all-wool underwear?

A. No, sir. May I answer you further?

Q. No. That is enough at present. You have received underwear that has been marked "Merino"?

534 A. I have.

Q. "Merino," at least in the underwear trade, means a garment made of cotton and wool, does it not?

A. That has always been the understanding.

Q. I thought that, but I was a little misled by one of your answers. So far as the trade itself is concerned, there never has been any question in the mind of a retailer, so far as you know, who bought a garment from a jobber or manufacturer which was labeled "Merino," that he did not expect to get a garment which was a mixture of wool and cotton?

A. Yes, sir.

Q. Now, you have talked about the unscrupulous dealer. Have you, from your own personal observation, ever seen a dealer sell to a customer a garment which was not all wool, representing it to be an all-wool garment?

A. I can only answer that in a vague way, if you will permit me—

Q. (Interposing). I do not want you to answer it in a vague way. Can you answer it yes or no, first?

A. The natural supposition is no. I do not in my own shop, and I do not wait on anyone else's shop.

535 Q. Do you know, from your own experience in your own shop, of any instance where a customer has received a garment marked "Merino," or with the brand "Merino" on it, where the customer expected to get an all-wool garment, and in place thereof got a part wool and part cotton garment?

A. Speaking of my specific shop?

Q. Yes.

A. Fortunately I deal with an intelligent class, and have my men who wait on them drilled in a proper way, and the terms "all wool," or "part wool," or "percentage of wool" have never entered into it with any of our clientele. So, if you are asking me with regard to my shop, I can not answer.

Q. Well, the experience that you have testified from to-day is from your own personal observation, is it not?

A. Yes.

Q. What experience or personal observation have you had, outside of your own store, or contact with your own customers or your own salesmen?

A. That is the point I tried to answer before. I have had men to come in and ask for an all-wool garment, like they had on, we having the same identical garment in the shop, and then the  
536 question arose whether ours was the same. We were told "yes; that is a duo-fold, or cooper," or whatever underwear it was, and the lot number inside of their garment would show the same as ours, but ours was different from what they asked for. But, at the same time, it was the identical garment. They have asked for an all-wool garment. To the nearest of our knowledge, there is no such thing made as an all-wool garment. When it comes to percentages, we can not answer percentages, because the representatives themselves can not tell what percentage of wool or cotton a garment contains.

Q. Have you, in your own experience, any instance where any person receiving a garment marked "Merino" thought he was receiving a garment which was all wool and not one which was part wool and part cotton?

A. When a man says to you he wants an all-wool garment like he has on, and our box is marked "Merino," I would say that was one specific case where the man thought he bought all wool and came to us for a like garment.

Q. In your experience, which you say covers over 26 years, how many cases have there been where the brand "Merino" was  
537 asked for, and there have been those misunderstandings?

A. That would be a very vague question for me to answer. I can only make a guess, in 25 years, that I have heard it one hundred times, or two hundred times, or twice a year, or something like that.

Q. I am asking you what the fact is.

A. I can not give you the facts. I can say that the question has been asked me and I have answered it.

By Examiner McKEAG:

Q. Did you say more than once?

Answer. Oh yes; yes. More than 50 times.

By Mr. FRANCE:

Q. Where they have asked for "Merino" specifically?

A. No. You asked me about the garments in the box that I was going to replace their garment with, when they asked for a like garment, and it was marked "Merino." The natural conclusion is that Cooper marks all of his boxes the same, whether they are in Goldheim's, Woodward & Lothrop's, or any other store.

Q. From what manufacturers do you buy?

A. The American Hosiery Company; Duo-fold; Wilson; Cooper; Otis; Glastenbury—offhand, that is all I can remember.

538 Q. Do you exhibit to your customers, in your sales, these labels?

A. We never let a customer see them, sir.

Q. So that, in purchasing from your house, the garments are sold on the representation of the salesman?

A. Right.

Q. You, in your experience, have never sold a "Merino" garment for other than a cotton and wool mixture?

A. To the best of my knowledge, never.

Q. And your salesmen, to the best of your knowledge, have never done that?

A. Never.

Q. Have you ever, in your experience, had a customer come in and ask for a garment, using the term "Merino," which he expected to be all wool?

A. I don't remember of an instance.

Q. Is there any such a thing made and put upon the market as all-wool underwear, marked "Merino," to the best of your knowledge?

A. No.

Q. Is it not a fact that such underwear as is upon the market, which is all wool, is specifically marked "all wool," or something of that kind, to indicate that it is made completely of wool?

A. I have no all-woolen underwear, and I can not answer you, sir. It is not made, to the best of my knowledge and belief.

Q. Is this the fact, in your opinion, that the general public which has dealt with you and purchased from you all these years, have bought garments from you, knowing that they were not all-wool garments?

A. Yes, sir.

Q. So that in no one of the cases that your experience has brought you in contact with has any man come to you asking for an all-wool

garment and received anything else? Have you ever had a man come to you and ask for an all-wool garment?

A. Invariably, sir.

Q. And they have asked in what terms?

A. They have asked whether we had an all-wool garment.

Q. You never heard one ask whether or not you had a "merino" garment?

A. No.

Mr. FRANCE. That is all.

540 Mr. CLARK. That is all.

(Witness excused.)

AMBROSE REEDER SWAN was called as a witness in behalf of the commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Swan?

A. Merchant.

Q. Where are you located?

A. 3132 Fourteenth Street.

Q. Do you deal in men's underwear?

A. Yes, sir.

Q. How many years have you been in the business?

A. Since 1907?

Q. Have you been, during any of that time, a salesman?

A. Have I what?

Q. Are you at present acting as a salesman in your store?

A. Yes, sir.

Q. During that time you have purchased underwear manufactured by various American manufacturers of underwear?

541 A. Yes, sir.

Q. And you have come in contact with the purchasing public, selling your own goods, and through your salesmen, and you are familiar with the labels used on the boxes by the manufacturers, I presume?

A. Familiar with those which I handle.

Q. Do you recall such names as "natural wool"?

A. Yes; I have seen those on the boxes, "natural wool"—

Q. (interposing). Whose goods do you handle now?

A. Well, we are handling some Glastonbury goods.

Q. Can you mention any other manufacturer whose goods you handle now, or whose goods you have handled?

A. We handle Winship, Bort & Company.

Q. What is their line?

A. I handle their cotton goods—no wool stuff.

Q. How are they labeled?

A. "Cotton."

Q. Underwear?

A. Rib cotton; yes.

Q. Did you ever know of the term "merino" as applied to cotton goods?

542 A. No; "merino," in its sense, is wool. It is not cotton at all.

Q. Now, in your contact with the public who come to buy underwear, are you able to state whether you have formed an opinion as to what they understand by the term "Merino"? Just answer that yes or no. Have you an opinion?

A. Oh, yes; I have an opinion.

Q. Please state it.

A. You will have to ask me that question again, sir.

Q. From your experience, what do you understand to be the public's understanding of the term "Merino," as applied to underwear?

A. If a person spoke of "Merino," I should say if he had knowledge, and knew what "Merino" was —

Mr. FRANCE (interposing). One minute. I think that question is susceptible of a direct answer, and the witness starts off with a supposition. I do not think that is answering the question. I will ask that it be stricken out.

By Examiner McKEAG:

Q. Can you answer the question directly?

A. For myself, or for my trade?

Q. Your opinion that you have formed from your experience, dealing with the public in the sale of underwear.

543 By Mr. CLARK:

Q. Your opinion as to what the public understands by the term?

A. I would hardly be able to answer that.

Mr. CLARK. I ask that he be allowed to answer the question in his own way.

The WITNESS. I can answer that question as to my own knowledge, but as to what I would believe when a customer asked for "Merino" underwear, I cannot answer as to what a customer means, because I do not know what they mean.

By Mr. CLARK:

Q. I am only trying to get, for the benefit of this commission, your understanding, as far as it goes. You say you have had experience, and the commission has not had experience in dealing with people in the sale of underwear. Now, what is your impression as to what the public understands by the term "Merino," when it goes to buy underwear?

A. I will have to answer you just as I was going to, that if a customer came in to me —

Mr. FRANCE (interposing). I object.

Examiner McKEAG. I will let him answer subject to your objection, Mr. France.

544 The WITNESS. If a customer came in to me and asked for "Merino" underwear, I would naturally show him the best I had.



By Mr. CLARK:

Q. In what respect the best?

A. "Merino," in my own personal opinion, means wool.

Q. What do you understand "Merino" means?

A. Wool, every bit of it.

Q. And if a customer asked you to show him "Merino" underwear, what would you produce, if you had it?

A. I would produce the best I had. It might not be all wool, but I would say "This is as near wool as I have."

Q. How about the term "Natural wool"? Have you any impression as to what the public understands by that?

A. Yes. I would term it more color than anything else.

Q. With regard to its composition, as to wool or cotton?

A. In my own opinion, "Natural wool" could be half cotton.

Q. And how about "Natural worsted"?

A. When you get into worsted, you get into wool again.

Q. Bear in mind that this is directed to what the public understands?

A. Understand, I can not argue from the public standpoint.  
545 I can only give you my version, as I see it. You must realize that, waiting on hundreds of people, there are not six alike that have the same opinion. I probably should not commit myself as to what the public thinks, but I can give you my own opinions, as I said.

By Examiner McKEAG:

Q. You mean by that what the average individual who came into the store to buy underwear would understand, one who did not have any specific knowledge, one way or the other, about the wool or cotton content? That is what you mean, is it?

A. Yes.

By Mr. CLARK:

Q. Do you sell this underwear from the manufacturers' boxes?

A. We do; yes, sir.

Q. And they are put on the shelves when you receive them?

A. Just as we receive them, we put them up in there.

Q. From your observation and experience, have you an opinion as to whether the term "Natural merino," as it appears on the boxes of the manufacturers, is used, in the hands of unscrupulous dealers, to

546 bear out the representation by them that the goods are all wool, whereas they are only cotton and wool?

Mr. FRANCE. You will permit me to put on the record the objection which I have made under similar circumstances?

Examiner McKEAG. Yes, sir.

Mr. CLARK. Please read that question.

(The reporter thereupon read the question referred to, as follows:)

"Q. From your observation and experience, have you an opinion as to whether the term 'Natural merino,' as it appears on the boxes

of the manufacturers, is used, in the hands of unscrupulous dealers, to bear out the representation by them that the goods are all wool, whereas they are only cotton and wool?"

Examiner McKEAG. He may answer, subject to Mr. France's objection.

By Mr. CLARK:

Q. Have you an opinion? Answer yes or no.

A. No.

Q. You have not an opinion?

A. I have no knowledge of such a thing. Therefore I could not have an opinion, not having a knowledge of it.

Mr. CLARK. I think that is all.

547 Cross-examination by Mr. FRANCE:

Q. Now, Mr. Swan, in the opinions that you have expressed here on these various terms, are they your own personal opinions and your views as to what those labels or brands mean? Is that what I understand by your testimony here?

A. I don't quite get you.

Q. You are not testifying to what the customer or the general public has in its mind when it comes to you to buy underwear?

A. I am giving my opinion, just as I see it.

Q. Do you sell any all-wool garments?

A. No. To this date, I don't think I do.

Q. You have bought garments from the manufacturer and from the jobber with this label "Merino" on them?

A. Not this season, and probably not last season.

Q. Since 1907?

A. I would not be able to answer that question.

Q. Have you never bought a garment marked "Merino" from any jobber or manufacturer?

A. Again I will say I could not answer that question, because  
548 I don't know. It may have been "Natural merino;" it may have been "Natural wool;" or it may have been "Merino." I could not say, as I have no particular time to study it or to know.

Q. Where did you get any information about these labels and the character of the garments upon which they are found, and about which you have testified here?

A. Well, in the beginning, from what little knowledge I have, I know the definition of wool. I know the definition of "Merino."

Q. If I should show you, in a Standard Dictionary, the word "Merino," and show you that in the trade and industry it means a garment made of cotton and wool, would you change, then, your opinion that "Merino" simply means wool?

A. Well, most any of us are open to conviction.

Mr. CLARK. I object to that on the ground that that is irrelevant, because we are not interested in what he might be persuaded to believe. If it has any significance, it is a question of what he understands now.

Mr. FRANCE. Here is a man who comes here as an expert.

Mr. CLARK. But you have held him down to his own personal views.

549 Examiner McKEAG. He has indicated that he has some knowledge of the definition of "Merino"; and, consequently, he is subject to cross-examination on that point.

By Mr. FRANCE:

Q. Don't you know, as a matter of fact, that the term "Merino," in the underwear trade, between manufacturer and jobber and retailer, has meant, for many, many years past, a garment which is a combination of wool and cotton?

A. No; I don't know that.

Q. Have you ever seen an underwear garment made entirely of wool marked "Merino"?

A. I would not be able to say that, "ever."

Q. Have you ever heard of any such underwear garment?

A. Marked what?

Q. Marked "Merino." Have you ever heard of an all-wool underwear garment marked "Merino"?

A. I would not be able to answer that question. I wish to correct a statement that you made just now, for all of you. You said "expert." Wrong. I am not an expert, in any sense, in the underwear game. That is almost a minor department in my store. It takes up only a small fraction of my space, and why I should be termed  
550 as an expert I can not get you.

Q. Then, you do not know very much about this general subject?

A. I have never admitted that I knew anything. I am simply telling you what I do know.

Q. Then, you do not know very much about it?

A. I will leave that to you, whether I do or not. I am not going to answer that question.

Q. Do you think you do?

A. My personal thoughts will not be even interesting in this case.

Q. They are of interest to me, sir. Do you think so?

A. Well, I will not answer that question unless I have to.

Q. Never mind.

A. I will answer you that question in another way, sir. I feel that I have knowledge of my own business, in my own little way.

Q. Have you ever sold an all-wool garment, an all-wool underwear garment?

A. I might have, but I would not swear to it.

Q. The possibility that you have is extremely remote?

551 A. Yes; I should say that I came as close to it in 1914—1913 or 1914—maybe, as I ever did.

Q. Now, is it not true that all garments—that is, within your own experience and your own sales—which you have sold for all wool, have been distinctly marked all wool?

A. I have never sold any for all wool. As I told you a while ago, I was not positive that I had sold all-wool garments.

Q. In your experience, what labels and brands have you come in contact with?

A. I should say most of the men's underwear that we get are marked more or less "Natural wool"; very seldom "Merino."

Q. Have you had some that have been marked "Merino"?

A. We may have had, but I would not like to say. I have not to-day, at least.

Q. Your experience goes back to 1907?

A. Yes, sir.

Q. Now, within that time, have you handled any garments that were labeled "Merino" by the manufacturer or the jobber?

A. I will have to answer you that in the same way. I would not be able to say. I don't know.

Q. Did you ever have a customer ask you for a "Merino" garment?

A. Oh, yes. People come in the store every day and ask for "Merino" underwear. That does not mean anything, in the sense of the trade.

Q. What do you sell them?

A. As I said a while ago, I sell them the best garment I have, or the nearest "Merino" which I consider, in my own personal opinion, "Merino" wool.

Q. If a man asks for a "Merino" garment, what do you sell him?

A. All right, sir. Are you the customer? "Here is a gray garment. Here is a good garment. It is not all wool. I am positive of that; but it is the nearest to merino that I can give you."

Q. And that garment which you are selling the customer is composed of what?

A. Naturally, if I say it is not all wool, you know what it is.

Q. What is it composed of? I want you to state it for the record.

553 Examiner McKEAG. We will have to get you to state it for the record.

The WITNESS. It must be wool and cotton, of course. We understand that.

By Mr. FRANCE:

Q. Your testimony is that in the 13 years of experience you have never had a jobber or manufacturer present to you a garment for purchase, with the definition or label "Merino," holding it out as a garment which was made partly of wool and partly of cotton?

A. No; I never have, to my knowledge.

Q. That is sufficient. You, in that entire career, have never heard the term "Merino" applied in the underwear trade to a garment made partly of wool and partly of cotton?

A. No; I can not say that I have.

Q. May I ask you who first interviewed you about this matter?

A. Yes. Is it all right, gentlemen, to state?

Examiner McKEAG. Yes, sir.

The WITNESS. Mr. John Burkett.

By Mr. FRANCE:

Q. Is Mr. Burkett related to you?

A. He is.

Q. How?

554 A. Brother-in-law.

Q. Is Mr. Burkett connected with the Federal Trade Commission in any way?

A. Not to my knowledge. I don't know really what he does. I understand—I will be perfectly frank with you. When Mr. Burkett came in to see me, it was the last thing I had in mind that anything like this was in his mind, and I spoke to him socially, in a social way. It was not in any way at all in an official way. I do not consider that I was the proper man for the Government or anyone else to examine.

Examiner McKEAG. Do you want the record to show who Mr. Burkett is?

Mr. FRANCE. I think I would like to have the record show that.

Mr. CLARK. Mr. Burkett is an examiner of the commission.

The WITNESS. I knew that he was in the capacity of an attorney in some manner, shape, or form. I knew that he went out of the city on certain cases.

By Mr. CLARK:

Q. For the Government?

A. Yes; for the Government. But, as far as this particular  
555 line of work is concerned, I am a very busy man, and so is he, and I never bothered my head about it one way or the other.  
(Witness excused.)

MORRIS M. ABRAMSON was called as a witness in behalf of the commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Please state your business, Mr. Abramson.

A. Men's and ladies' furnishings.

Q. Where are you located?

A. 1250 Seventh Street NW.

Q. How long have you been in the business?

A. I have been there six years.

Q. Have you had any experience as a salesman of men's furnishings, including underwear?

A. Yes, sir; for the last 20 years.

Q. Do you purchase underwear?

A. I do; yes, sir.

Q. You have, in the past, bought underwear from various American manufacturers?

A. Mostly jobbers and manufacturers, a few.

556 Q. You are familiar with the labels which underwear manufacturers place on the containers or boxes in which they ship?

A. The kind I handle I am familiar with.

Q. Tell me what companies you have dealt with?

A. I handle the goods of the Buster Brown Hosiery Mills.

Q. Do they make men's underwear?

A. Men's underwear and ladies', too; yes, sir.

Q. Are there any other manufacturers whose goods you handle?

A. Roxford Knitting Mills.

Q. Do you handle the Winsted Hosiery Company's goods?

A. No, sir.

Q. These garments are delivered to you in boxes, paper boxes?

A. Yes, sir.

Q. And you sell the goods from them?

A. Yes, sir.

Q. Can you state any or all of the labels which appear on the boxes of these goods which you say you have purchased?

557 A. Well, the labels are on the boxes; for instance, it is labeled "underwear; cotton underwear." I don't handle no wool. It is cotton.

Q. Do you handle any wool underwear?

A. No; I don't.

Q. Does the label "merino" ever apply to your goods?

A. I never handle that. I think "merino" means fine wool.

Mr. FRANCE. I ask that that be stricken out.

Examiner McKEAG. That may be stricken out. It is not responsive.

By Mr. CLARK:

Q. What do you understand by the term "merino," as applied to underwear?

Mr. FRANCE. I object to that, on the ground that there is no proper basis for that question.

Examiner McKEAG. He is asking this witness's own personal understanding.

The WITNESS. I looked it up in the dictionary, and I found that "merino" means a fine thread wool.

By Mr. FRANCE:

Q. You say you have looked it up?

A. I did look it up. I found that "merino" means fine wool. I once looked it up, and I found it meant a fine thread of wool.

558 By Mr. CLARK:

Q. But you have not dealt in woolen underwear?

A. No, sir.

Mr. CLARK. That is all.

Cross-examination by Mr. FRANCE:

Q. When was it you looked it up?

A. I don't remember the date of it, but I think maybe, last year. Some time ago I wanted to know what "merino" was, the meaning of it, and in the dictionary I found it was a fine thread of wool.

Q. Do you recollect what dictionary you looked in?

A. Webster's Dictionary, I think. There may be some other meanings of it. Maybe I looked in the wrong dictionary.

(Witness excused.)

Examiner McKEAG. We will adjourn at this point until 9.30 in the morning.

(Whereupon, at 2.30 o'clock p. m., an adjournment was taken until to-morrow, Saturday, November 27, 1920, at 9.30 o'clock a. m.)

559 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION, COMPLAINANT,	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY, RESPONDENT.	

HEARING ROOM, FEDERAL TRADE COMMISSION BLDG.,

Washington, D. C.,

Saturday, November 27, 1920—9.30 a. m.

Met pursuant to adjournment.

Before Examiner James McKeag.

Appearances: As heretofore noted.

PROCEEDINGS.

560 EDGAR CHARLES KAUFMAN was called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Kaufman?

A. Merchant; men's furnishings.

Q. Where is your place of business?

A. 431-433 Seventh Street.

Q. Washington?

A. Yes, sir.

Q. How long have you been in the gentlemen's furnishing goods business?

A. Fifteen years.

Q. And part of that time have you been employed as salesman?

A. Yes.

Q. And you have handled underwear?

A. Yes, sir.

Q. And you have also, latterly, been in charge of the underwear department in your store?

A. Yes, sir.

Q. And you are familiar with the products of American knit goods manufacturers, in underwear, to some extent?

A. Yes, sir.

561 Q. You have bought underwear from various American manufacturers?

A. Yes, sir.

Q. Will you name some of them, if you can?

A. Taunton Knitting Mills. I think we have handled some of the Winsted Hosiery Company.

Q. Do you handle the Winsted now?

A. No, sir.

Q. When you receive your purchases of underwear, they are delivered to you in boxes, are they?

A. Yes, sir.

Q. And you place those boxes on the shelves of your store?

A. Yes, sir.

Q. And sell the goods from them?

A. Yes, sir.

Q. Do you recall, among the manufacturers' labels on underwear boxes that are so received, such labels or brands as "Natural merino"?

A. Yes, sir.

Q. And "Natural wool"?

562 A. Yes, sir.

Q. "Australian wool"?

A. Yes, sir.

Q. "Gray wool"?

A. Yes, sir.

Q. And "Natural worsted"?

A. Yes, sir.

Q. From your experience as salesman and in charge of underwear departments, and your observation in those situations, have you formed an opinion as to the understanding by the public—that is, as to what the average purchaser of underwear understands by the term "Natural merino"?

A. I don't think he is acquainted. I think it is left up to the salesman.

Q. What would you say, from your experience, would be the impression as to the quality of the garment which a purchaser would get from seeing a label on a box "Natural wool"?

A. Well, naturally he would think it was wool, and then he would ask the percentage of wool.

Q. What do you personally understand to be the meaning of the term "Merino"?



563 A. Wool.

Examiner McKEAG. As applied to underwear?

Mr. CLARK. No.

Examiner McKEAG. Just generally?

Mr. CLARK. Just generally.

By Mr. CLARK:

Q. Do you handle or have you handled all-wool underwear?

A. No, sir; not knowingly.

Q. Have you in your experience had calls from customers for all-wool underwear?

A. Yes, sir.

Q. Have they ever designated that class of garments as "merino"?

A. I could not answer that.

Q. That is, you do not recall?

A. No, sir.

Q. What, in your understanding as a merchant, does "merino" mean as applied to underwear?

A. Wool.

Q. All wool or a part wool?

A. Well, I should think a part wool.

Q. What part; what percentage?

564 A. I could not answer that, sir.

Q. You know, I am asking you as to what quality of goods, in respect of the percentage of wool in them, the term "Merino" is applied in the trade.

A. Yes, sir.

Q. Can you state any range or percentage to which that term is applied?

A. No, sir.

Q. Is the term "Merino" ever applied in the trade to all-cotton goods?

A. No, sir.

Q. That is in your experience?

A. Yes, sir.

Q. If a man looking for underwear should come into your shop and see in the underwear department, on the shelves, a box labeled "Australian wool," what, from your experience, is your idea that he would understand the garments in that box to contain, as respects the quantity of wool?

Mr. FRANCE. I object to that as a specific occasion. I think he has a right to ask what his opinion of the general public's opinion is, but I object to his asking for a specific instance as not proper examination.

565 Examiner McKEAG. He may answer subject to your objection. The WITNESS. May I have the question?

(The question was repeated by the stenographer as above recorded.)

The WITNESS. I could not answer that.

By Mr. CLARK:

Q. You could not answer that?

A. No, sir.

Q. That is, you do not know whether he would get the impression that it was all wool or 10 per cent wool?

A. Well, he would ask, "How much wool does it contain"?

Q. I know; but what I am trying to get at is his impression originally, before he has any instruction from the salesman.

Mr. FRANCE. I make the same objection for the record.

Examiner McKEAG. He may answer subject to your objection.

By Mr. CLARK:

Q. I understand you to state that "merino" means to you wool.

A. Yes, sir.

566 Q. I ask you again, for the purpose of securing clearness, so that we do not misunderstand, what you understand from your experience that the average purchaser understands by the term "Merino" as applied to underwear.

Mr. FRANCE. I object to that as already gone over. The witness has stated repeatedly that he can not answer, or that the public is not acquainted, and I do not think that it is proper that this should be constantly repeated.

Examiner McKEAG. He may answer subject to your objection.

A. He would think that it would be wool; that is all.

By Mr. CLARK:

Q. And that applies, I presume, to such labels as "Natural wool"?

A. Yes, sir.

Q. And "Gray wool"?

A. Yes, sir.

Q. And "Australian wool"?

A. Yes, sir.

Q. What do you think he would understand by the label "Natural worsted"?

A. He would think it was a mixed garment, if he was aware and knew.

567 Q. I do not mean if he had any knowledge such as the trade has; but a man not familiar with any conventional trade terms—the average public—what would you think would be his understanding of such a label as "Natural worsted"?

Mr. FRANCE. I want to enter an objection to that, because that assumes facts which are not established; that there is a distinction in the general public's mind as to those. For that reason I think the question is improper.

Examiner McKEAG. He may answer subject to your objection.

A. I would think he would think it was part wool—a mixture.

By Mr. CLARK:

Q. From your experience do you believe that the public accepts largely the brands on goods as indicating their quality in respect of the amount of wool in them?

Mr. FRANCE. I would like to enter an objection to that as being not the proper subject of testimony by this witness.

Examiner McKEAG. He may answer subject to your objection.

By Mr. CLARK:

Q. Do you understand the question?

A. No; I would like to hear it again.

568 (The stenographer repeated the question as above recorded.)

A. Yes.

By Mr. CLARK:

Q. In your store you sell the underwear contained in the manufacturers' boxes from the boxes?

A. Yes, sir.

Q. You take down the boxes from the shelves, if they are on them?

A. Yes, sir.

Mr. FRANCE. Objected to as leading. I think the witness should state how he sells his goods.

Mr. CLARK. He has already stated it.

Examiner McKEAG. He has stated it previously.

By Mr. CLARK:

Q. State, if you can, from your observation and experience, what knowledge your own salesmen have of the quality of the underwear they sell.

A. They haven't any more than I have.

Q. Can you determine by your own inspection the amount of wool in a garment?

A. No, sir.

Q. How near do you think you could come to it?

A. I haven't the least idea.

569 Q. And the salesmen at least are no better informed than you?

A. No, sir.

Q. State whether or not they are guided in their representations as to the quality of garments largely by the labels on the boxes.

A. No, sir.

Q. They are not?

A. No, sir.

Q. What does guide them?

A. Well, their imagination and their guess.

Q. Then if a salesman understood, as you say you understood, that the term "Merino" means wool, and he saw it on one of these manufacturers' boxes, what direction do you think his imagination would take as to the quality of the goods in that box?

Mr. FRANCE. I am going to enter an objection to this as mere speculation, surmise, and guess, and that is what this question really is leading to.

Mr. CLARK. No; because he says it depends on imagination; that does not mean at all that this question is speculative.

570 Examiner McKEAG. He may answer, subject to your objection.

By Mr. CLARK:

Q. Do you understand the question?

A. Let me have it again, please.

(The stenographer read the question as above recorded.)

The WITNESS. He would think it contained wool.

By Mr. CLARK:

Q. In your opinion as an experienced merchant, Mr. Kaufman, does the presence of such labels as those I have named on the boxes from which underwear is sold lend itself to a misrepresentation by unscrupulous salesmen?

A. Yes.

Mr. FRANCE. For the record, I enter my objection.

Examiner McKEAG. The objection will be noted, and the answer is subject to the objection.

By Mr. CLARK:

Q. Can you state, generally or in detail, what, in your experience, you base that general statement on?

Mr. FRANCE. I object to that as immaterial and irrelevant. He has asked for an opinion from this witness, and he has gotten it.

Examiner McKEAG. He may answer subject to your objection.

571 (The pending question was repeated by the stenographer as above recorded.)

Mr. CLARK. Let us have the previous question.

(The stenographer read as follows:)

"Q. In your opinion as an experienced merchant, Mr. Kaufman, does the presence of such labels as those I have named on the boxes from which underwear is sold lend itself to a misrepresentation by unscrupulous salesmen?

"A. Yes."

\* \* \* \* \*

"Q. Can you state, generally or in detail, what, in your experience, you base that general statement on?"

The WITNESS. Well, that the purchaser is not in anywise more familiar than the man that waits on the trade. He doesn't really know.

By Mr. CLARK:

Q. In your experience, generally speaking, a garment is valued by the public in proportion to the amount of wool in it, is it not?

A. Yes, sir.

Mr. FRANCE. I object to that as incompetent and immaterial, and there is nothing to show that this witness has any basis of knowledge of that.

572 Examiner McKEAG. The answer is taken subject to your objection.

By Mr. CLARK:

Q. So that, as a fact, in making sales, the more wool the purchaser understands to be in a garment, the more likely the sale can be made, assuming the price to be the same?

Mr. FRANCE. One minute. I object to that question as leading in a most pronounced degree.

Examiner McKEAG. No doubt about that.

Mr. FRANCE. And I think it is an improper way of examining a witness to really find out what is in the witness's mind and get the facts.

Examiner McKEAG. It is highly leading, Mr. Clark.

Mr. CLARK. Off the record.

(After discussion, off the record.)

By Mr. CLARK:

Q. Are salesmen as a rule paid according to the volume of sales they make?

A. No, sir.

Q. What?

A. No, sir.

Q. Do you know of any cases where the pay, either in salary  
573 or commissions, of a salesman of underwear depends in part on the quantity of his sales?

A. Sometimes; yes, sir.

Mr. CLARK. I think that is all.

Cross-examination by Mr. FRANCE:

Q. Mr. Kaufman, as I understand you, so far as your knowledge is concerned, in dealing with underwear, when a garment is marked "Merino" you know it as a garment which is a mixture of wool and cotton?

A. Yes, sir.

Q. And you have been in this haberdashery business for 15 years?

A. Yes, sir.

Q. And in all that time, in your experience, an undergarment made of cotton and wool has been termed very frequently a "Merino" garment?

A. No.

Q. Called "Merino"; branded "Merino"?

A. Not in all instances.

Q. Not in all, I know; but a "Merino" garment has always been known in the trade as a garment made of cotton and wool?

A. Well, the word "Merino" would impress me—

574 Q. Wait a minute. In your trade—I am talking about you and your knowledge—in your trade, a "Merino" garment meant a garment made of cotton and wool, did it?

A. Yes, sir.

Q. And you never saw a garment that was all wool that was marked "Merino," did you?

A. I have never seen an all-wool garment.

Q. You have said that a customer coming in and being shown a garment which had the brand "Merino" on it, would say, "How much wool is there in it?" Is that what I understood you to say?

A. Yes, sir.

Q. So that he did not expect an all-wool garment, did he?

A. No; I should not think so.

Q. As a matter of fact, when a man comes into your establishment to buy an all-wool garment, he states that he wants an all-wool garment, does he not?

A. Yes, sir.

Q. I also gathered that your salesmen, in a general way, are as well informed upon these matters as you are; are they?

A. Yes, sir.

Q. And I gathered also that it was your opinion that the  
575 average purchaser was about as well informed as the man who waits on the trade?

A. Just about.

Mr. CLARK. I object to that, because I think you are assuming the contrary of his testimony.

Examiner McKEAG. He is cross-examining, Mr. Clark.

Mr. CLARK. I know that, but I object to certain assumptions in his questions, nevertheless.

Examiner McKEAG. On cross examination he has very wide latitude.

Mr. CLARK. I know that, but there is a limit to it. I want my objection on the record.

Examiner McKEAG. The objection will be noted and the answer is subject to the objection.

By Mr. FRANCE:

Q. As a matter of fact, Mr. Kaufman, your expressions of opinion here this morning are really surmise and speculation, are they not, so far as concerns the opinions that individual people may have about these matters?

A. Yes.

Mr. FRANCE. I think that is all.

576 Redirect examination by Mr. CLARK:

Q. The opinions you have expressed as to the understanding of individuals and salesmen are based on your experience in business?

A. Yes, sir.

Q. You have heard some discussion among your fellow merchants of the question of the misbranding of various fabrics, including underwear?

Mr. FRANCE. I object to that as immaterial and irrelevant; what he has heard his fellow merchants say about misbranding.

Mr. CLARK. Off the record.

(After argument off the record:)

Examiner McKEAG. The answer will be admitted subject to objection.

Mr. CLARK. Read the question.

(The pending question was repeated by the stenographer as above recorded.)

A. Yes, sir.

By Mr. CLARK:

Q. In your opinion is it desirable, in the interest of fair dealing with the public, that such brands as are used on underwear, 577 as "merino" or "natural wool," should only be used in connection with terms such as "cotton," when there is cotton in the garments?

A. Yes, sir.

Mr. FRANCE. Before you answer that, let me have an objection on the record.

Examiner McKEAG. Note that the answer is subject to Mr. France's objection.

Mr. CLARK. That is all.

Recross-examination by Mr. FRANCE:

Q. Mr. Kaufman, the purchaser depends pretty largely on what the salesman says to him that the garment contains, does he not?

A. Yes, sir.

Q. Is it not a fact that you can obtain from your jobber and from your manufacturer—and if they are reliable concerns it is a fair presumption that the figures you obtain are correct—can you not obtain from them the amount of wool which is in the garment?

A. Yes, sir; I think so.

Q. So that you and your salesmen are prepared to tell a 578 customer what amount of wool is in a garment, as represented by the manufacturer, if he asks?

A. No; because I would not remember that.

Q. Let me ask you this, Mr. Kaufman: In buying your goods, don't you buy according to grade?

A. Yes.

Q. And does not grade depend upon the mixture which is in your goods; because you say you only deal with mixtures, with cotton and wool goods?

A. Yes.

Q. And when you buy them, don't you make a tabulation or a notation of what the percentage of wool is in the garments?

A. I ask the question, "How much wool does it contain?"

Q. And your records contain that, do they not?

A. We do not make any record of it.

A. Don't you, in your establishment?

A. No, sir.

Q. Do you sell goods that are marked with no brand at all except a trade-mark name, like "Reese Underwear"?

A. Yes, sir.

Q. There is nothing on that to indicate whether it has any wool at all in it, is there?

579 A. No, sir.

Q. And there are all sorts of prices on them?

A. Yes, sir.

Q. And they are all marked the same way?

A. Yes, sir.

Q. So that in such cases the only way that you can tell the purchaser as to why one garment costs more than another is that the manufacturer sells it to you at a higher price?

A. Yes, sir.

Q. And you do not know whether there is 10 per cent wool or 75 per cent wool in that garment, except as you gauge it by the prices that you receive?

A. Right.

Q. And in your experience do you think that anybody has ever been deceived, of the general public that has come into your store purchasing these cotton and wool goods, by any of the brands that you have had on your shelves?

A. No.

Mr. FRANCE. That is all.

By Mr. CLARK:

580 Q. Have you known of any instances, Mr. Kaufman, where people, being offered at your shop a mixed wool and cotton garment, have said that they believed that they had procured an all-wool garment for that price?

A. Not in my particular shop; no, sir.

Mr. CLARK. That is all.

(Witness excused.)

Mr. CLARK. I wish to read into the record this extract from Cole's Dictionary of Dry Goods, dated 1892, a revised edition, by George S. Cole, page 256.

Examiner McKEAG. Any objection, Mr. France?

Mr. FRANCE. No.

Mr. CLARK. (Reading:) "*Merino*.—The finest wool-bearing breed of sheep in the world, of Spanish origin, so called from their anciently being under the superintendence of a *maerino* (major) or superintendent of the Spanish sheep pastures. For centuries the finer wools used for clothmaking throughout Europe were obtained from Spain, which country was the home of the famous merino breed, developed from races of sheep introduced by the Romans, the originals of which formed the flocks of the patriarchs thousands of years ago, and have been the parent stock of all fine wool sheep since. The Spanish  
581 merino sheep were introduced into Saxony in 1765, and by judicious crossing developed the famous Electoral breed, which produced the most expensive wool grown in Europe. At Rambouillet, France, merino sheep have been bred more than a century, and the



flock is known all over the world. The merinos of Rambouillet have the original character of the Spanish breed, without any taint of crossing. In America the merinos are by far the most valuable breed, the wool they produce being second to none. The sheep of the United States are said to be 95 per cent merino, this breed thus forming the basis of the entire industry. What are known as the Saxon Merinos (Electoral breed) originated from a flock of 200 Spanish sheep imported to Saxony in 1765. They were bred with great care, and improved over the original in quality of wool. These, as well as typical specimens of the species in Spain, are yearly brought to the United States and crossed with our native merinos, to the manifest improvement of the fleece in every instance."

Mr. FRANCE. May I offer the next definition of "Merino" as found in your dictionary?

Mr. CLARK. I thought you had introduced it.

582 Mr. FRANCE. I do not think I did in full, as I have it here.  
[Reading:]

"*Merino*.—A woollen dress fabric, first made at Bradford, England, in 1826, of pure merino wool, at which time it was one of the most expensive varieties manufactured. In appearance it is thin, light woolea material, twilled on both sides, back and face alike. *Merino* is also a term applied to a variety of medium-weight, soft finished, knitted underwear, formerly made of merino wool, but now of cotton and wool mixed."

(At this point a short informal recess was taken.)

Mrs. BETSY A. INNES was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Mrs. Innes, you live in Washington, do you not?

A. Yes, sir.

Q. I show you this sheet, called a questionnaire, and ask you if you recall receiving that by mail? [Handing a paper to the witness.]

583 A. Yes, sir; I do.

Q. I will ask you what the term "Natural merino," as applied to underwear, implies to your mind, as regards the composition of the goods.

A. Well, when I was buying the goods, if I bought merino I would get very fine wool. It is all wool—supposed to be. But, as I haven't bought any in years, I don't know.

Q. How long is it since you have?

A. Well, my husband has been dead 10 years, and, of course, my boys were married long ago, so I don't have to buy any such wear at all, not even wool socks; and it must be—well, it is 10 or 12 years since I bought any, anyway.

Mr. CLARK. Thank you; that is all.

Cross-examination by Mr. FRANCE:

Q. Have you always lived in Washington, Mrs. Innes?

A. No, sir.

Q. What section of the country do you come from?

A. Pennsylvania; Bradford—well, I was born in Bradford County, but I lived about 36 years in Lycoming County, 20 miles above Williamsport.

584 Q. And you came to Washington about how many years ago?

A. It will be seven years in January.

Q. Do you know of any difference in the use of the term "merino" as applied to dress goods and as applied to underwear?

A. Well, years ago, when I was a girl, I used to hear of the merino dress goods, but I don't know much about it; and I have heard of the merino wool underwear. I had a son that was sickly, and we bought the very finest—we supposed it was merino underwear—for him.

Q. What did you ask for, Mrs. Innes?

A. We would ask for the merino underwear, and would get the very finest woolen underwear that could be procured for him.

Q. Where was that?

A. Up in Williamsport, Pa.

Q. Have you ever known that the term "merino" used in the underwear business has meant for a great many years a combination of wool and cotton?

A. No, sir; I never have.

Q. When you bought an all-wool garment, you asked for an all-wool garment, did you not?

585 A. Yes, sir. That is what I wanted when I would buy anything like that.

Q. Did you ask for an all-wool garment?

A. I asked for an all-wool; yes, sir.

Q. You so specified?

A. Yes.

Q. And you believe that you got an all-wool garment?

A. Well, yes; I do. I am a pretty good judge of all wool; I used to be. I was taught to buy the best instead of buying anything mixed.

Mr. FRANCE. I think that is all, Mrs. Innes.

(Witness excused.)

Mrs. EMMA ALICE TAPPAN was thereupon called as a witness, and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live, Mrs. Tappan?

A. 11 R Street NE.

Q. In Washington?

A. Yes.

Q. Do you recall receiving this paper [handing a paper to the witness]?

586 A. Yes; I recognize my signature here.

Q. What do you understand by the term "Natural merino"?

A. Well, I consider it all wool.

Q. And as to the term "Gray wool"?

A. What was the second?

Q. "Gray wool."

A. All wool, I consider it.

Q. And "natural wool"?

A. All wool.

Q. And "natural worsted"?

A. All wool.

Q. And "Australian wool"?

A. All wool.

Q. As applied to underwear?

A. Yes. Now, that is what it appears to me. That is what I would consider if I bought goods with that trade-mark.

Mr. CLARK. That is all, Mrs. Tappan.

Cross-examination by Mr. FRANCE:

Q. How long have you lived in Washington, Mrs. Tappan?

587 A. All my life.

Q. Do you ever recollect, Mrs. Tappan, asking at a furnishing store for a suit of merino underwear?

A. Yes.

Q. And what did you get?

A. Well, I supposed I got all wool.

Q. When was the last time that you bought merino underwear?

A. Well, it has been a good many years since I have bought any.

Q. How long ago; just roughly?

A. Oh, maybe, 30 or 40 years ago, since I bought it for my children. They are all grown now.

Mr. FRANCE. I think that is all.

(Witness excused.)

Mrs. BETSY A. INNES, a witness previously sworn and examined, was recalled and testified as follows:

Direct examination by Mr. CLARK:

588 I neglected to ask you your understanding of the terms "Natural wool" and "Gray wool".

A. Well, it should be all wool; I suppose it is—all wool. "Natural wool," I suppose, is just as it comes from the sheep. That is the way my father used to call it, when he was a farmer.

Q. And "natural worsted"?

A. Yes; that is all wool, too.

Q. And "Australian wool"?

A. Yes, sir; wool—all wool.

(Witness excused.)

JOHN C. HALEY was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Haley, and where?

A. I am engaged in the retail drug business at the Portland Building, at 14th Street and Vermont Avenue.

Q. I show you this sheet addressed to you, and ask you if you recall receiving it by mail. [Handing a paper to the witness.]

A. I do.

Q. I ask you what you understand to be the meaning of the term "natural merino" as applied to underwear.

A. My understanding of "merino" is that it is wool. Being applied to the word "underwear," and the word "natural" added to it, makes no difference in my understanding of what "merino" means, which is wool.

Q. And as to the other terms below that?

A. Well, wool is used in worsted. "Worsted," "Australian wool," "natural worsted," and "natural wool" all means wool to me.

Mr. CLARK. That is all.

Cross examination by Mr. FRANCE:

Q. You are a druggist, Mr. Haley?

A. Yes, sir.

Q. Do Spanish flies come from Spain?

A. I understand they do not.

Q. Time has made a change there, has it not, as to what that term applies to?

590 A. Spanish fly is used only as Spanish fly, and for specific drug which is known, defined and understood throughout the drug trade and throughout the laymen as applying to a specific, particular natural product.

Q. Now, if you found in the underwear trade that the term "merino," from the merino sheep originally coming from Spain, had come to mean for a great many years, in the underwear trade, a garment made of cotton and wool, can you not conceive of such a growth of language and definition as you have found in your own profession?

A. Speaking from the consumer's or the purchaser's standpoint, trade names are used to conceal the true product of the goods.

Q. I am not asking for an expression of opinion. That question is susceptible of an answer yes or no.

A. Yes. I do not follow you exactly, because you are starting with a natural, unmanufactured substance or product and applying a trade practice to a manufactured product.

Q. Is that altogether so? As a matter of fact, taking Spanish flies for example, my father used to be a druggist, and I remember on my father's shelves a bottle that had Spanish flies in it. There is such a thing, is there not?

591 A. Oh, yes. The whole fly is known as the Spanish fly.

Q. And it no longer is the fly which comes from Spain, is it?

A. Well, whether it ever came from Spain, I do not know. It is applied to a certain fly which is identified and recognized as that particular fly, whether it is in the powdered form or whether it is in some other form. It does not properly apply to any other form of blistering insect.

Q. Now, there are a great many terms, are there not, in the language that have changed as time has gone on?

A. Undoubtedly.

Q. The English language is a growing language, is it not?

A. Yes.

Q. Take the word "mohair." Do you know that mohair was originally a fabric manufactured by the Moors in Spain?

A. Yes.

592 Q. And it got its name from that. Mohair today is not manufactured in Spain, is it?

A. I do not know. I usually have to ask my wife what a particular product is, when some of these terms are used.

Q. Take the term "gauze." Gauze gets its name because it was originally manufactured at Gaza. As you buy gauze to-day, do you expect a gauze that is manufactured at Gaza?

A. It has a different meaning now than it had when it was first applied.

Mr. CLARK. Allow me.

Mr. FRANCE. Yes.

Mr. CLARK. For the record I object to this as cross-examination, aside from the question here. This witness is produced simply to express his understanding of this term, and it does not affect the value of his testimony on that point to show his ignorance or intelligence as to the correct understanding or any other understanding.

Mr. FRANCE. I think it is proper cross-examination within certain bounds.

Examiner McKEAG. This witness is in an entirely different line of industry, and I think counsel have some latitude in cross-examining to ascertain the growth of the meaning of words in other  
593 industries, aside from the underwear industry, since that is their defense in this case, as I understand it; and I will permit, within reasonable latitude, the continuation of this examination.

By Mr. FRANCE:

Q. Does the term "japanned ware" convey to your mind ware that has come from Japan?

A. No. That is not my understanding of what "japan" means. "Japan" is not applied to ware as the name of the country of the source or origin, but japanning is a special method of treatment of the surface of metals.

Q. Then does it not appear, from the matters that we have discussed just now, that words which originally indicated a locality have come to represent a certain character of goods?

A. If they are named for a locality that is recognized as a locality; but in the words under discussion here——

Q. Wait a minute; I do not want to argue. My question is susceptible of an answer yes or no, and if you want to explain it afterwards it is all right, but now I want a definite answer. Have you ever looked in the dictionaries to determine what "merino" means in the underwear business?

A. No; for the reason that——

594 Q. I do not ask you for your reason; I ask you whether you have or not. Have you?

A. I have not.

Q. So you do not know whether your idea of "merino" comports with the definitions that are found in standard dictionaries or not, do you?

A. No.

Q. You would accept Webster's New International Dictionary as a standard, would you not?

A. As a dictionary definition; yes.

Q. Well, where do we get correct definitions of our terms, as used in our language, except from our dictionaries?

Examiner McKEAG. That is argumentative, Mr. France. I do not believe we ought to permit argument.

Mr. FRANCE. Probably that is true. I think that is all.

Mr. CLARK. That is all, sir.

(Witness excused.)

395 Mrs. AUGUSTA ALEXANDER was thereupon called as a witness and, having been first duly sworn, testified as follows:

Redirect examination by Mr. CLARK:

Q. Where do you live, Mrs. Alexander?

A. 2032 Fifteenth Street, NW.

Q. Do you recall receiving this piece of paper by mail [handing a paper to the witness]?

A. Yes, sir; I do.

Q. What is your understanding, Mrs. Alexander, of the term "merino" as applied to underwear?

A. All wool, was always my opinion.

Q. And the term "natural merino"; is that any different?

A. No, sir; I didn't know there was any difference. I never knew anything about that. I always thought that "merino" meant all wool.

Mr. CLARK. That is all that I care to ask.

Cross-examination by Mr. FRANCE.

Q. Mrs. Alexander, have you always lived in Washington?

A. Well, not always; Baltimore and Washington.

Q. Then originally you came from Maryland?

A. Yes, sir; I am a native of Maryland.

Q. Have you ever bought a garment and asked for a  
596 "merino" garment?

A. Well, I only know merino as dress goods, things of that kind. Now, in underwear I just ask, "Is this all wool?"

Q. So that when you said that you were of the opinion that "merino" meant all wool, you were referring to dress goods?

A. Well, not particularly, but in flannel—all pure "merino" flannel, or anything of a fine grade or good quality.

Q. But when you came to buying underwear—and that is what we are interested in here—

A. Yes, sir.

Q. (continuing) You did not ask for "merino" underwear; you asked for all wool?

A. I would always ask, "Is this all wool?" and they would tell me, "Yes, or partly so."

Mr. FRANCE. That is all, Mrs. Alexander.

Mr. CLARK. That is all.

By Examiner McKEAG:

Q. Has anyone ever told you that "merino underwear" was an all-wool garment?

A. Certainly, sir. I always was of the opinion that "merino" meant all the very finest of wool—pure wool. That is all that

597 I know about it; and, of course, I expect to get what I pay for.

When I pay for "merino," I expect to get it, or they should inform me if it is not what I want.

(Witness excused.)

Mrs. MARY L. ABERNETHY was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Please state your residence, Mrs. Abernethy.

A. 65 The Iowa.

Q. In this city?

A. Yes.

Q. Do you recall receiving this questionnaire some time ago, Mrs. Abernethy [handing a paper to the witness]?

A. Well, I expect I had better state this: It came, and I was busy out in the kitchen. My daughter came out and read it, and says, "Mother, are you going to answer this?" I says, "Oh, no, I guess not; I haven't time; throw it in the wastebasket." She says, "Mother, you are not a bit patriotic; this is some Government business and we ought to do our part towards it"—

598 Mr. FRANCE. I move that the answer be stricken out, if the examiner please.

Examiner McKEAG. That is immaterial.

By Examiner McKEAG:

Q. You got it and answered it?

A. She answered it herself. She filled in my name, and all that I know is——

Mr. FRANCE. I think you had better wait until Mr. Clark asks the questions.

The WITNESS. Very well.

By Mr. CLARK:

Q. Let me ask you, Mrs. Abernethy, what you understand by the term "merino" as applied to underwear?

A. I have understood that it was made of the wool from the merino sheep, which produces the finest, softest wool, and that it was originally entirely made of that wool.

Q. And what would you say as to the term "natural wool" as applied to underwear; what would you expect?

A. I would understand that it was the wool from the sheep.

Q. And the term "Australian wool"?

A. Well, I really know nothing about it.

599 Q. Or "natural worsted"? They happen to be the terms involved in this inquiry.

A. Well, I think that I have understood that worsted was a little bit different from wool. I don't know what the difference is; but when, if I may say it, I go to select underwear, all-wool goods, I test it by burning it, and I test it by feeling it, and that soft, peculiar, silky feeling I have understood was merino, as my mother taught me to decide it. If two or three kinds of wool were given me, I believe that I could pick out, from the feeling, merino from other wools, but that is just about the extent. Another thing——

Mr. FRANCE. One moment. I do not want to object, but I think we had better ask questions.

The WITNESS. This is the first time I have ever been a witness.

Mr. FRANCE. It is not your fault; I do not mean that.

Mr. CLARK. I am through.

Cross-examination by Mr. FRANCE:

Q. I understood you to say when you were talking about the term "merino," a garment made of merino or called "merino," that it was originally entirely of wool. As a matter of fact,  
600 do you not know to-day that "merino" in the underwear trade is used and has been used to mark a garment that is made partly of wool and partly of cotton?

A. That was just what I wanted to say a while ago. One of the clerks in a department store—when I went in a few years ago and asked if they carried the merino underwear, she showed me some cotton stuff. I said, "Why, merino is the most expensive and the finest of wool goods." She says, "You don't know anything about it; 'merino' means cotton." I said, "Well, I beg to differ with you,



and will you show me some wool underwear?" Now, that is just to show you how some people think of merino.

Q. When you buy underwear, you ask for all-wool underwear?

A. Yes.

Q. That is how you ask for it; "all-wool"?

A. Yes, sir.

Q. Do you know what brands, what makes, you have bought?

A. We have not worn any wool, not in my family, for 15 years.

Q. As a matter of fact, a garment made of cotton and wool suits you better?

601 A. No; not any wool at all. We wear simply the thin cotton underwear.

Q. So you have not bought any woolen underwear for, roughly speaking, about 15 years?

A. Certainly not for 15 years.

Q. So that your opinion on this thing is based on your experience of 15 years ago?

A. Yes, sir; and my raising.

Q. Fifteen years ago?

A. Certainly; between 15 and 20 years ago is the last.

Q. Mrs. Abernethy, are you a native of Washington?

A. Yes; I was born in Washington. Part of my married life was spent away, but I have been here for 16 years now.

Mr. FRANCE. That is all.

(Witness excused.)

Mrs. McLEAN ADAMS was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. You live in Washington, Mrs. Adams?

602 A. 112 D Street NW.

Q. Do you recall receiving this questionnaire? [Handing a paper to the witness.]

A. I do.

Q. What is your understanding, Mrs. Adams, of the term "Merino" as applied to underwear?

A. The finest quality of all wool.

Q. Can you state your understanding of the term "Natural merino"? Is that any different from "merino"?

A. Not that I know of.

Q. What do you understand, may I ask, as applied to underwear, by the term "Natural wool"? It is outside of this questionnaire, but can you express an opinion on that?

A. I am afraid I haven't given it any thought.

Q. And you do not care to express an opinion?

A. Well, not without thinking seriously of it; no.

Mr. CLARK. I think that is all.

Cross-examination by Mr. FRANCE:

Q. Mrs. Adams, have you spent your life here in Washington?

603 A. I have been here since 1905. I am a New York Stater.

Q. Mrs. Adams, have you ever examined the dictionary at all in preparation for answering these questions?

A. I have; Webster's.

Q. And did you examine Webster's New International Dictionary?

A. I have not, though I have one. I have one, but I have not examined it.

Q. You did not examine that one?

A. No, because I got it after the questionnaire was mailed back.

Q. If you found that in Webster's New International Dictionary he gave as one of the meanings of "merino" a fine fabric made originally of merino wool, but later of fine wool mixed with cotton, would that vary your opinion as to what merino was?

A. Why, I have never heard it stated that way before.

Q. Well, you examined the dictionary in preparation for answering these questions, did you not?

A. Yes, but it was not the late one.

Q. And if you had found this late one—and this is the quotation which is in evidence—would that have varied your  
604 opinion?

A. Why, no; because I have always believed in buying merino that I was buying the nicest and the best wool material, and I certainly paid for it.

Q. You are talking about material. It is dress goods and flannels that you have in mind, is it not?

A. Well, "merino" could apply to more than one.

Q. I am asking—

Mr. CLARK. I object. That is a fair answer. She responded directly.

Mr. FRANCE. May I have my question read again? I am not endeavoring to confuse the witness.

Mr. CLARK. I think there is a limit to leading on cross-examination.

Examiner McKEAG. It has not been reached yet.

(The stenographer read as follows:)

"Q. You are talking about material. It is dress goods and flannels that you have in mind, is it not?"

Examiner McKEAG. You had better reframe the question, Mr. France.

By Mr. FRANCE:

605 Q. In considering this term "Merino" as meaning wool, and a very fine wool, you have in mind your experience in buying dress goods or flannels, or something of that kind?

A. No; I have not. In thinking of that, in my mind, it covered underwear, stockings, and gloves—merino gloves. When I was a

child growing up my mother wore merino gloves; she didn't wear silk gloves or kid gloves, like we wear nowadays.

Q. When you purchase underwear and want an all-wool garment, what do you ask for?

A. For merino.

Q. You ask for merino?

A. For merino underwear. If I don't get it, it is the sales person.

Q. Have you gotten that at varying prices?

A. Oh, yes; surely.

Q. When you buy goods you depend, do you not, upon the salesman or the house with which you deal?

A. Yes; the house with which you deal.

Q. And the statement of the salesman or of the representative of the house with which you deal is what determines in your mind the kind of goods that you are getting?

A. Well, they naturally would not misrepresent to a customer. It would not be to their advantage.

Q. So, in buying goods you depend upon the salesman's representations?

A. Wouldn't you?

Q. I am asking you.

Mr. CLARK. I submit this is not proper cross-examination.

Examiner McKEAG. She may answer subject to your objection. Just answer the question, Mrs. Adams.

The WITNESS. What is the question?

(The stenographer read as follows:)

"Q. So in buying goods you depend upon the salesman's representations?"

A. Yes.

By Mr. FRANCE:

Q. That is what guides you, of course, entirely in purchasing?

A. Yes.

Mr. FRANCE. That is all.

Mr. CLARK. That is all, Mrs. Adams.

(Witness excused.)

Examiner McKEAG. We will adjourn until 1.30.

(Thereupon, at 12.10 o'clock p. m. a recess was taken until 1.30 o'clock p. m.)

607

AFTER RECESS.

The hearing was resumed, pursuant to the taking of recess, at 2 o'clock p. m.

Miss ARCLEY R. MARSHALL was called as a witness in behalf of the commission and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live, Miss Marshall?

A. 1030 Seventeenth Street.

Q. What is your present occupation?

A. I am the executive secretary of the Consumers' League of the District of Columbia. I am representing the National League as well, because we are affiliated with the National League.

Q. Have you been employed for some time as a saleswoman?

A. Yes; some time ago I was, before I came to Washington; four or five years ago I had been employed at various times in selling goods, to the extent of, I should think, three years' experience—probably a little more.

Q. Where was that?

A. Do you want the names of the stores?

608 Q. No; the general locality or sections of the country.

A. In Mason City, Iowa, and in Faribault, Minn.

Q. Have you had any experience of your own, in your own individual capacity as saleswoman, which might throw some light on the question of the understanding by the public of such terms, as applied to underwear, as "Merino"—

Mr. FRANCE (interposing). I object to that question in that form.

Examiner McKEAG. You have not shown by this witness that she has any information about any of those things.

Mr. CLARK. I did not ask her her opinion. She has stated her experience, which would throw light on it.

Mr. FRANCE. I object to such a general question, asking her to state any experience she might have had which would throw light upon this proposition.

Examiner McKEAG. Why not ask her if she has had any experience first, and then let her detail the instances. Objection sustained.

Mr. CLARK. I note an exception.

By Mr. CLARK:

Q. In this time that you state you were employed as a saleswoman, did you handle underwear?

A. Not all of that time.

609 Q. Any of it?

A. Yes, sir. I did a part of the time, and while I did not have the department, and was not a buyer of that underwear, the store was not so large but that we all knew the stock fairly well throughout, and we did occasionally, in finishing with a customer, go to two or three departments and sell them their entire bill of goods. I was well known to and well acquainted with the girls who did have charge of that end of it.

Q. Confine it to your own experience. Did you yourself, at any time, sell underwear to the public?

A. Yes, sir.

Q. Did you, in your experience, sell any underwear labeled or marked "Merino"?

A. Yes, sir.

Q. What, at that time, did you understand those garments to consist of, as regards the woolen or cotton content?

A. I did not know them to have any cotton. I understood them to be a very fine grade of wool and in good faith. The other—

Q. (Interposing.) That is as far as you will be allowed to testify.

Did you ever buy a "Merino" garment, so labeled?

610 A. For my individual use, you mean?

Q. Yes.

A. Yes, sir. I did, in this same store—these same labels I have in mind.

Q. What did you understand you were buying then?

A. I certainly understood I was buying a fine grade of wool garment, because I remember—

Mr. FRANCE (interposing). I object. You have answered the question.

By Mr. CLARK:

Q. What was the garment, in fact, if you know?

A. I only have one of those garments. I bought three suits. I have one garment yet in my possession, and it is not all wool. It showed up when it was laundered that it had some cotton in it.

Q. Miss Marshall, have you recently visited some Washington stores where they deal in underwear?

A. Yes, sir.

Q. Have you, on those visits, talked with the employees of the various stores who handle underwear?

A. Yes, sir. I have been interested—

611 Examiner McKEAG (interposing). Don't say what they have said yet. Just tell the extent of your visits.

The WITNESS. All right.

By Mr. CLARK:

Q. Have you made memoranda of your conversations?

Mr. FRANCE. I object to that as immaterial, irrelevant, and incompetent, whether she made a memorandum or not.

Examiner McKEAG. She may answer.

The WITNESS. Yes, sir; I did.

By Mr. CLARK:

Q. Will you state the names of the shops which you visited, as you stated, and give the substance of your conversations, which you may have held?

Mr. FRANCE. One minute.

Examiner McKEAG. I would divide that question, Mr. Clark. Let her show just where she went, first, and then let her state the conversations.

By Mr. CLARK:

Q. Please state what shops you visited.

A. May I refer to the memoranda so that I may be accurate?

Examiner McKEAG. With regard to the names, yes.

The WITNESS. That is what I mean. I visited fourteen Washington stores.

By Mr. CLARK :

Q. Give their names, please.

612 A. James Goodman & Company, Seventeenth and Pennsylvania Avenue. Sidney West, Fourteenth and G. R. T. Cissell, two stores, one on F Street—I am sorry I do not know for certain the number—and the other one at the corner of Seventeenth and G; I called them just one firm. The Sweater Shop, at 800 Seventh Street. Behrend's, on Seventh Street; I don't know the number. Goldenberg's, on Seventh. King's Palace, on Seventh. Saks & Company, Seventh and Pennsylvania Avenue. James Davis & Sons, 1201 Pennsylvania Avenue. The Army Supply Company, 1203 Pennsylvania Avenue. Palais Royal, Eleventh and G. Kann's Sons & Company, Eighth and Pennsylvania Avenue. Woodward & Lothrop's, Eleventh and F. Parker-Bridget, at Ninth and Pennsylvania Avenue.

Q. Please state, as near as you can, the actual conversation, or substantially the conversation you had in each place, taking a store at a time.

Mr. FRANCE. I want to enter an objection to that, as immaterial, incompetent, and pure hearsay. That is not proper testimony in this proceeding. The direct witnesses whom she has interviewed, here in Washington, are the proper persons to be examined with regard to this matter.

613 Examiner McKEAG. She may answer, subject to your objection.

The WITNESS. In James Goodman's I shopped for men's underwear, and I asked to be shown wool underwear. They brought down boxes of the Winsted Hosiery Company and showed me the contents, offering no explanation as to the quantity of wool, but in response to my request to be shown wool underwear. During the course of the shopping I asked if these garments were all-wool, and they were showing me at that time two grades of Winsted Hosiery Company goods. They said no, they were not; that they were practically 60 per cent wool, as nearly as they could tell.

By Examiner McKEAG :

Q. What was the label?

A. "Merino" in both instances. One was a heavy and one was a light quality. They were both labeled "Merino."

In Sidney West's my experience was the same. I went through the same procedure exactly, and they showed me two qualities, just the same, and also Winsted Hosiery Company goods; but, instead of saying 60 per cent, this salesman said that they contained approximately 40 per cent of wool.

By Mr. CLARK :

Q. Were those goods under the same label?

614 A. "Merino;" yes, sir. In each instance they were men's vests.

In R. T. Cissell's, at Seventeenth and G, the salesman to whom I talked thought, when I asked to see "Merino" underwear——

Mr. FRANCE (interposing). Now, I object to what the salesman thought, and move that it be stricken out.

The WITNESS. I said what he said.

Mr. FRANCE. No; you said what he thought.

The WITNESS. I beg your pardon. I will correct that. When I asked to see "Merino" underwear, he said, "I am not sure that we have it," and he walked back to the underwear department, and then to the front of the store, and he said, "Do we carry the Merino line of underwear?" I then explained it was not a line I wanted to see, but it was a kind of material in anyone's line, of wool underwear. He had no idea what I meant.

Mr. FRANCE. I ask that that be stricken out.

Examiner McKEAG. State what he said.

The WITNESS. He said that he did not know what I meant, that he misunderstood me, and I asked him how much experience he had had in selling underwear. He said he had sold underwear a long time in a number of Washington stores, but he seemed to look like——

615 Mr. FRANCE (interposing). I objected to what he seemed.

Examiner McKEAG. Just state the conversation.

The WITNESS. Well, I did not stay any longer, because I could see that I was not going to get any information.

Mr. FRANCE. I ask that that be stricken out.

Examiner McKEAG. That is not responsive. Just state your experiences, without giving any of your opinions. Your opinions will come later.

The WITNESS. I went to R. T. Cissell, on F Street, but I did not stop in there. I asked them what they understood by the word "Merino," as applied to underwear.

Mr. FRANCE. When you say "they," you had better state whom.

Examiner McKEAG. Specify whom you mean.

The WITNESS. Two sales people. I was in conversation with two sales people. I asked them what they understood by the word "Merino," as applied to underwear, and they said that they understood the trade term, meaning it was a combination of cotton and wool. I asked them if they thought that the public understood that.

616 Mr. FRANCE. One moment. I am going to object to that. I think that is improper, to get this second and third hand.

Mr. CLARK. Yes. I would not give that.

(At this point followed discussion off the record, which the reporter was directed not to record, at the conclusion of which the hearing was resumed as follows:)

The WITNESS. As sales people they knew the meaning of the trade term.

Examiner McKEAG. No, no; you can not state that. Just repeat the conversations, as near as you can.

The WITNESS. As sales people they told me that they understood the meaning of the trade term "Merino" to be cotton and wool.

By Mr. CLARK:

Q. Did they handle the Winsted goods?

A. R. T. Cissell did; yes, sir.

Q. Were they displayed in the boxes labeled "Winsted"?

A. In every instance, in Washington, where I found Winsted Hosiery Company goods, they were displayed in the manufacturer's boxes.

Q. And can you state the number of places where that was the case?

A. There were seven out of these fourteen, counting all the time this Cissell store as one place, though there are two stores. There is something I want to say there, but I don't know whether it is proper or not.

Mr. FRANCE. I imagine there is something you would like to say.

The WITNESS. I know that this is important. It should be a part of this testimony.

Examiner McKEAG. We will come to that later. Mr. Clark will ask you about it later.

By Mr. CLARK:

Q. You can state, now, anything that was said by either you or the persons with whom you were in conversation?

Mr. FRANCE. Without incumbering the record, it is understood that the same objection will apply to all this line of testimony.

Examiner McKEAG. Yes, sir. The same objection will apply to all of this testimony.

By Mr. CLARK:

Q. Confining the conversation to what they said as to their own understanding, you may proceed.

A. Isn't this within their own understanding, that when I asked them—

Examiner McKEAG (interposing). Wait a minute.

(At this point followed brief discussion off the record, which the reporter was directed not to record, at the conclusion of which the hearing was resumed as follows:)

The Witness. At The Sweater Shop this man, in response to my question as to what the word "Merino" meant, said that "Merino" should mean wool. It was important that any garment so labeled should be wool, but that many of the garments which they had had, had bought and had sold, had been largely cotton, that were labeled "Merino."

Mr. FRANCE. I am going to ask that that be stricken out because that is an expression of opinion. That is simply giving the opinion, second hand, of a salesman, or a jobber, or retailer, such as we have had here repeatedly. That testimony, however, under your rulings, is admissible. But, when Miss Marshall comes in here and testifies that somebody else, in his mind, has an idea, I think it is going far beyond the scope of proper testimony.



Mr. CLARK. I can see that it is.

Mr. FRANCE. I ask that that be stricken out.

Mr. CLARK. Not all of it.

Mr. FRANCE. That last statement.

Mr. CLARK. Yes, sir.

The WITNESS. What part is that, then?

619 Mr. CLARK. Read that last answer, Mr. Stenographer.

(The reporter thereupon read the last answer of the witness as follows:)

"A. At the Sweater Shop, this man, in response to my question as to what the word 'Merino' meant, said that 'Merino' should mean wool. It was important that any garment so labeled should be wool, but that many of the garments which they had had, had bought and had sold, had been largely cotton, that were labeled 'Merino.'"

Mr. FRANCE. I will ask that that be stricken out.

Examiner McKEAG. Your motion, Mr. France, will be reserved for a ruling by the Commission.

Mr. CLARK. I would like to make the statement, for the record, that I think that is not objectionable.

The WITNESS. In Behrend's, I asked two clerks, apart from each other, first one, and then the other, what "Merino" meant, as applied to underwear when she handled it. These were girls in the underwear department. The first girl told me that "Merino" underwear was silk and wool, and the second girl told me that it was a fine grade of wool.

In Goldenberg's, they showed me two grades of "Merino"  
620 labeled goods, not Winsted goods, but Forest Mills goods. Each one told me that she sold them as heavy and light grades of wool. They were labeled, to be exact, "Heavy weight merino," and "Light weight merino." She knew that they were not all-wool, she told me, and showed me one garment that was a mixture of mercerized and cotton, and so labeled, which she said they did not show the label of, but put up the goods and sold them as silk and wool. I asked this girl if she had been long in the underwear line, and she said yes, she had worked for a number of years in this store. To her, personally, the word "Merino" meant wool.

By Mr. FRANCE:

Q. Is that what she said?

A. Yes; that is what she told me. But she did not apply that to the goods that she sold over the counter, she said. I asked her if she explained to the people that this was a mixture, and she said she pleased her customer. She met the desire of her customer. If her customer wanted an all-wool garment, she talked the garment up for all-wool.

At the Kings Palace, I talked to two sales people at the same time. They both said that they understood the trade term "Merino," as used on the labels, to be a mixture, but that it was so—the feel of the garment, they told me, was so as to indicate to the buying public that it was wool.

621 Mr. FRANCE. I object to that, and ask that that be stricken out. That is an expression of opinion.

The WITNESS. No; this is what they were selling to their people.

Mr. FRANCE. I am not talking to you.

The WITNESS. I beg your pardon.

Mr. FRANCE. Excuse me. These are expressions of opinion as to what the public thinks, stated by somebody who is not here, a seller of the goods, reported directly through the witness on the stand. I think that comes within the prohibition that you have laid down.

Examiner McKEAG. The answer will stand, subject to your motion to strike.

By Mr. CLARK:

Q. Proceed, Miss Marshall, just as you had been doing.

A. They told me that because of this—

Examiner McKEAG (interposing). You have already gone over it. Go on with the next one.

The WITNESS. I beg your pardon. They showed me one label that they called an honest label.

By Mr. CLARK:

Q. What was that?

622 A. It was "Duo-fold," which they explained to be wool outside and cotton inside, so woven.

Q. So marked?

Mr. FRANCE. No; marked "Duo-fold."

Examiner McKEAG. That is all that is on it, just "Duo-fold."

The WITNESS. I am not sure whether it had anything more than "Duo-fold" on it, but they considered it an honest label.

Mr. FRANCE. I move to strike that out.

Examiner McKEAG. Let it stand, subject to your objection. You may continue.

The WITNESS. At Saks & Company, the salesman to whom I talked said that "Merino," to him, meant a fine all-wool.

At James Davis & Sons, the salesman told me, in response to this same question, that he understood the trade term "Merino" to mean a mixture, and that he did not misrepresent the goods as he sold them across the counter, if he were asked. If they did not ask him, he said they sold the goods as labeled.

At the Army Supply Company, the salesman to whom I talked, of whom I asked this same question, what "Merino" meant to him, said that he understood "Merino" to be an especially fine grade of wool, and anything so labeled on his shelves, he would understand to be wool.

623 By Mr. CLARK:

Q. Did he deal in Winsted goods?

A. No, sir. At the Palais Royal, one sales lady to whom I talked and asked what she sold "Merino" for, said it never was all-wool, that it never had been, that it was a mixture of either cotton and wool, silk and wool, or mercerized cotton and wool.

Then, I went to another part of the store and asked two sales-ladies the same question, and they both told me that they understood "Merino," on their boxes, to mean a fine grade of all-wool.

Q. Did you ask them whether they sold it for that?

A. One common question that I used was——

Mr. FRANCE (interposing). I think the witness should be limited to stating what she asked in this particular case. These generalizations lead us astray.

By Mr. CLARK:

Q. State whether or not you did ask, in this particular instance, if they represented the goods labeled "Merino" to be all-wool.

A. I remember of asking in the Palais Royal those two girls, "If I were to ask you for wool underwear, would you show me 'merino;' or, vice versa, if I were to ask you for 'merino,' would you show me wool underwear?" And they said yes, they certainly would; that was what they understood to be wool underwear.

At Kann's Sons & Company, three sales girls in a group, I asked if they had any "merino" underwear, and they did not know what I meant.

By Mr. CLARK:

Q. They said they did not know?

A. Yes. They said they did not know what the term meant, as applied to underwear. I asked them if they had any wool underwear, and they said not that they could be sure was wool, that it was very difficult to buy wool underwear now, and that Washington people did not demand very much wool underwear. That was the same trio.

At Woodward & Lothrop's, the sales people told me that they had the opportunity of seeing the invoices that came in, and the invoices showed the percentage of wool in the garments that they sold; and so they understood they were not all-wool. They understood how they were made up, what did comprise the garment, and that they told the truth to their customers. I asked them if they thought that the labels they were selling from, if the labels on the boxes truly represented the goods that was in the boxes, to me, as a customer, and they said no.

625 Mr. FRANCE. I object to that question as asking for an opinion, which I do not think is warranted from this witness.

Examiner McKEAG. Have you anything to say, Mr. Clark?

(Whereupon followed informal discussion which the reporter was directed not to record, at the conclusion of which the hearing was resumed as follows:)

Examiner McKEAG. I will let the answer stand as it is, subject to the motion of counsel to strike.

Mr. FRANCE. I don't believe she answered it.

Examiner McKEAG. Your motion is to strike. She has already answered it.

Mr. FRANCE. Excuse me.

The WITNESS. At Parker-Bridget's, in my conversation with this man, he told me that he had been, during the war, an examiner of army shirts, and that he had been a long time in Parker-Bridget's store, and that he thought he knew underwear and other wool garments and their make-up. He said that their sales people were instructed—he was an assistant buyer, and he said that their sales people in that store were instructed to try to tell the buying public the truth about what garments were made up of, and that it was a matter of constant education to their customers. There is a lot more in that, but nothing that you want.

By Mr. CLARK:

Q. Is there anything that you think would throw any light on the whole subject?

Mr. FRANCE. I object to that question, leaving to the witness what she may think throws light on it.

Mr. CLARK. I did that entirely in your interest, Mr. France.

Examiner McKEAG. We are piling up the record unnecessarily. I think.

By Mr. CLARK:

Q. Take up the next one.

A. That is all of the Washington stores.

Q. Have you stated fully your experience in any of these shops, in which you went through at least the form of purchasing a garment?

A. I did, in fully one-third, but I am not sure now that I remember just which ones. I do remember about those. I should rather not attempt to say which ones the others were. I would not be accurate on that.

Q. Did you go to the shop located at Pennsylvania Avenue and Seventeenth Street, on the north side?

A. That is Goodman's, is it not? That is where Goodman's is, at Seventeenth Street. That is James Goodman, I think.

Q. Do you recall going there?

A. Do you mean across from the District Court of Claims?

Q. Yes.

A. Yes; I did go there. I shopped there.

Mr. FRANCE. That is what she testified to, I think.

(At this point followed informal discussion of the record, which the reporter was directed not to record, at the conclusion of which the following occurred:)

Mr. CLARK. Please turn to where she mentions Goodman's shop.

(The reporter thereupon read the portion of the record referred to, as follows:)

"The WITNESS. In James Goodman's, I shopped for men's underwear, and I asked to be shown wool underwear. They brought down boxes of the Winsted Hosiery Company and showed me the contents, offering no explanation as to the quantity of wool, but in response to my request to be shown wool underwear. During the course of the shopping, I asked if these garments were all-wool,

and they were showing me at that time two grades of Winsted Hosiery Company goods. They said no, they were not, that they were practically 60 per cent wool, as nearly as they could tell."

628 By Mr. CLARK:

Q. You have covered all of the Washington shops?

A. All the Washington shops.

Mr. CLARK. That is all.

Cross-examination by Mr. FRANCE:

Q. Miss Marshall, how long ago was it that you sold goods at Mason City, Ia.?

A. I think five years; four or five years.

Q. And the other experience, at Faribault, Minn., was prior to that?

A. Just preceding that.

Q. How large a store was the store at Mason City where you sold?

A. Well, how do you want me to answer that?

Q. What was the size of it? Was it a little shop?

A. No, indeed. It was one of the leading Mason City stores.

Q. Was it a department store?

A. Yes, sir.

Q. How about the one at Faribault?

A. That was the leading department store of the town. The Mammoth Department Store was its name.

Q. How many employees did they have? Take the one at Mason City. How many employees did they have, about?

629 A. On this floor, which was the only place I would feel safe in saying how many, I should say approximately, as well as I remember, 10 or 12 salesladies.

Q. How many floors were there in the building?

A. Three.

Q. And in Faribault; how many employees were there, about?

A. About the same number.

Q. In which one of these stores were you identified with the underwear department?

A. I did not say I worked in the underwear department in any of these stores. I said I sold goods from them. That was not my department.

Q. How frequently did you leave your department?

A. Probably—

Q. (interposing). Not probably, but tell me as near as you can. What was your department?

A. Silks and yard goods; silks and wool dress goods.

Q. How frequently did you leave the wool or silk goods, for example, with a customer, and go over to the underwear department and sell the customer underwear?

A. There is no way I could answer that except by telling you as nearly as I can. I fail to remember exactly how many  
630 times I may have done that.

Q. About how many times?

A. I should say probably two or three times a week.

Q. So the line of demarcation between the departments in the Mason City store was not very definite?

A. This is not the Mason City store I am referring to. This is the Faribault store.

Q. I see.

A. I never left my department without someone in it.

Examiner McKEAG. He means, you were not confined to selling over one counter, but you went from one counter to another.

The WITNESS. We were confined to selling over our own counter except in instances where a customer came in, buying a tremendously large bill of goods, all over the main floor of the store, and, at rare intervals, relying upon our own judgment as to whether we were needed in our own department, we could follow this customer through if it was his desire.

By Mr. FRANCE:

Q. How many floors were there in this store?

A. Two.

Q. At Faribault?

631 A. Yes, sir.

Q. At Mason City you told me there were three floors?

A. Yes, sir.

Q. At Mason City, did you wander around from one department to another?

A. No, sir. I could not leave my department to go into but two others. I had the corsets in Mason City in one store that I worked, and I could go to the domestics, which is across the aisle, or I could go to the next one, on my same side of the store, which was the hosiery. We did not go further than that—

Q. (Interposing). What department do you refer to as the "domestics"?

A. (Continuing). Except in the mornings and during quiet hours.

Q. What department did you call the "domestics"?

A. Gingham, percales, and sheetings.

Q. Then, the underwear does not come within any of those departments?

A. I sold muslin underwear, only, in Mason City. I have not at any time said that I sold underwear in Mason City. There is  
632 another store in Mason City where I worked that I have not mentioned.

Q. Faribault, then, is the only place where you have sold underwear?

A. The only place where I have sold wool underwear. I have sold underwear in another Mason City store.

Q. You know very well what we are talking about. We are talking about wool underwear.

A. Wool underwear; yes, sir.

Q. So that your personal experience with the sale of woolen underwear is limited to this experience, more than five years ago, at Faribault, Minn.?

A. I don't recall any other time when I have had to sell wool underwear.

Q. How long were you in this store at Faribault, Minn.?

A. I think about five months. It was during the fall season, I know, when this particular line was mostly displayed.

Q. Now, will you give me an estimate of how many times you think you left your own department in the Faribault store with a customer and went to the underwear department and sold woolen underwear?

A. I don't think I am able to do that. There were a good many times.

633 Q. Now, Miss Marshall, you have got considerable bias on this question, haven't you?

A. Sir?

Q. You have considerable bias on this question at issue, have you not?

Mr. CLARK. I object to that.

Mr. FRANCE. I think I have a right to ask her whether she is biased or not.

Examiner McKEAG. She may answer.

The WITNESS. If I have any, it has been very recently aroused, at the revelation that what I had thought to be true before was an utter untruth.

By Mr. FRANCE:

Q. So that you are biased to-day?

A. I hope I have not been biased. I know I have not been biased in obtaining this information.

Q. What I mean to say is this: Your mental bent of mind at the present time is biased against the use of the term "Merino," is it not?

A. Not against the use of the term "Merino."

Q. All right. If you say no, that settles it.

A. I have said, "term," not "trade term."

634 Q. You have been active, have you not, before this commission on this question of the use of the term "wool," applied to various garments?

(No response.)

Q. Let me ask you this, if that remains unanswered.

A. I am not quite sure what you mean. That is the reason I hesitated to answer.

Q. When we had this trade submittal here on the 20th of October, or before that date, you appeared here as a speaker, did you not?

A. Yes, sir.

Q. Have you any other employment outside of this official connection which you have with this Fair Trade League?

A. I am not with the Fair Trade League.

Examiner McKEAG. It is the National Consumers' League.

By Mr. FRANCE:

Q. The National Consumers' League?

A. No; that is a big enough job.

Q. That is your occupation now?

A. It certainly is.

Q. How many times have you presented matters to this Commission since you have been connected with this Fair Trade League?

635 A. By "presenting," what do you mean? This is the first time I have before the Federal Trade Commission as a witness.

Q. Have you ever presented matters for their consideration during your connection with this Fair Trade League?

Examiner McKEAG. Not the Fair Trade League, Mr. France. It is the Consumers' League.

By Mr. FRANCE:

Q. The Consumers' League.

(No response.)

Examiner McKEAG. He means, have you ever submitted data to the commission about any other cases that they had before them.

The WITNES. No, sir.

By Mr. FRANCE:

Q. Do you attend regularly the meetings that are held, similar to this trade submittal which was held here in Washington on October 20th?

A. No; I do not attend them regularly. I do not know about them.

Q. Now, with regard to these three "merino" garments which you bought, when were they bought?

A. That same fall that I worked in the Faribault store, 636 the same lot that I was selling. That impression is very clear.

Q. That is more than five years ago that you bought those?

A. No; I don't think it is more. It is about five years.

Q. You said it was five years ago that you worked in the Mason City store.

A. I said four or five years. I am sorry I can not be exactly accurate, but I would have to think back over a number of different experiences.

Q. I think you ought to be accurate in this case, because this is of considerable importance to the Winsted Company.

A. It is within five years.

Q. So these were bought, anyway, from the Faribault store?

A. Yes, sir.



Q. You still have one of them?

A. Yes, sir.

Q. Do you know anything about the length of time which garments will wear?

A. Yes; I know that when I was in the cold country, where  
637 I had to wear that kind of underwear, I had always at the beginning of the season—I would arrange to have on hand three good suits, and during the cold weather, when we could not change from one weight to another, I wore three suits, and they would give good service for the cold weather for two seasons. The next season they usually would be used for the lighter weight underwear in the spring or fall.

Q. So, that is a fairly good commentary upon the garments that you had?

A. They were very good garments.

Q. They were sold to you for "merino"?

A. They were very good garments.

Q. Now, how do you know what their content was?

A. By the way they washed.

Q. Is that the only way you knew?

A. By the feel of them after they had been laundered, as they began to wear.

Q. Now, from your experience with the sales people in Washington, you find, do you not, that what the public gets depends pretty much upon the integrity and honesty of the salesman, do you not?

A. I would not say that what the public gets depends on  
638 that. What they believe themselves to be getting depends on that—that is, the general public.

Q. Do you know how many stores which you visited sell garments which are not branded other than by a trade name, such as Root, Root underwear, or Reis underwear, or some such brand?

A. Would you put that question again, please?

A. In any of these stores that you visited do you know whether they sell goods that are not marked as to content, or by any other trade name, but have a trademark such as Reis underwear, Munsing underwear, or Root underwear, or some such name?

A. I saw plenty of it that had the name of the company across the label. Underneath it would show something of the nature of the contents—that is, the trade name or trade term applied to it.

Q. Have you ever seen this Reis underwear?

A. Reis?

Q. R-e-i-s?

A. Not that I remember; no, sir.

Q. Or Munsing underwear?

639 Examiner McKEAG. I think they call it "Munsingwear."

By Mr. FRANCE:

Q. Or "Munsingwear"?

A. Yes.

By Examiner McKEAG:

Q. In these stores that you visited did you find any of those goods?

A. Yes, sir.

Q. Was there any indication on those as to the wool content?

A. Very often; yes. In some cases the Munsing, the Carter, and Forest Mills, the different grades will have the name of the concern in larger letters, and then underneath it will say "Men's wool shirts," or "Women's merino vests," or something to that effect.

By Mr. FRANCE:

Q. Is that your observation as to those brands that you have just named?

A. In a number of instances—and I am unable to say which ones—they would say—I have something here on that, with regard to the Forest Mills.

Q. I am asking you from your own observation. Let us have the question read, please.

(Whereupon the reporter read the question referred to, as follows:)

640 "Q. Is that your observation as to those brands that you have just named?"

The WITNESS. None showed the percentage, but some showed cotton and wool, mercerized and wool, silk and wool, or whatever combination it was.

By Mr. FRANCE:

Q. Now, did you ask in any of these stores for all-wool? Let us take the first one, James Goodman. You say you asked for wool underwear?

A. Wool underwear.

Q. Did you ask for all-wool underwear?

A. No, sir; until—

Q. Wait a minute. Were you not careful in presenting your question not to ask for all-wool underwear?

A. No, sir. In the course of the shopping—

Q. (Interposing). To start with, did you ask for all-wool?

A. I used no precaution on that, and I am unable to say in each instance whether I asked for wool or all-wool, because it never entered my mind.

Q. When the Goodman store sold you the Winsted Company's product, he told you what the percentage was in the garment?

A. Not until I asked him, very pointedly, if it was all-wool, and if not, how much he figured was wool.

641 Q. You didn't ask him for all-wool at the start, did you?

A. I don't remember, sir, whether I asked for wool or all-wool. That never entered my mind, to make that distinction, and I am not positive which I might have said.

Q. You knew, did you not, before you started out, the alleged misunderstanding that there exists in the mind of the public as to these terms?

A. Yes. I have found, certainly——

Q. (Interposing). Answer the question. Didn't you know that?

A. I knew that the buying public did not understand.

Q. That was your opinion?

A. I knew from those I had asked that they did not know.

Q. I do not want that. Now, watch my question.

Examiner McKEAG. Just answer his question as shortly and as pointedly as you can.

The WITNESS. If he will ask the question again, I will try to answer it.

Examiner McKEAG. Read it.

(The reporter read the question referred to, as follows:)

By Mr. FRANCE:

642 Q. You knew, did you not, before you started out, the alleged misunderstanding that there exists in the mind of the public as to these terms?

The WITNESS. Yes, sir.

By Mr. FRANCE:

Q. Was there a difference in price between the grade of garment sold by the Goodman Shop, 60 per cent wool, which you say was a Winsted product, and that sold by Sidney West, which you also say was a Winsted product, which had only 40 per cent wool?

A. Yes. At Goodman's——

Q. That is all right. There was a difference in price. Was it the same make?

A. The same label; the same kind of a box, the same wording.

Q. There was a difference in price?

A. Yes, sir.

Q. And the lesser percentage of wool brought the lesser price?

Mr. CLARK. I object to that as assuming that there was a lesser percentage of wool.

Examiner McKEAG. She has testified to that.

Mr. CLARK. She has testified that they said so. It does not follow at all.

643 Examiner McKEAG. It is based on her testimony.

Mr. CLARK. No, indeed; it is not. She said they said it was 40 and 60 per cent, respectively.

Examiner McKEAG. That is all that is at issue here.

By Mr. FRANCE:

Q. Did they ask more in Sidney West's for 40 per cent wool products than they did for the 60 per cent at Goodman's?

Mr. CLARK. Same objection to that.

Examiner McKEAG. She may answer, subject to your objection.

The WITNESS. Yes. They had a special price running in West's.

By Mr. FRANCE:

Q. They had a special price, and they charged more?

A. No; they charged less. I thought you asked me that.

Q. Now, you told me of one place, the Palais Royal, I believe, where you saw first a woman in the underwear department and she told you that "merino" never meant all-wool? Is that right?

A. Yes, sir.

Q. That was in the underwear department?

644 A. Yes, sir.

Q. Then, you say you went to another part of the store. What other part of the store did you go to?

A. Still in the underwear department, but away from this young woman, so that what she had told me would not have any effect on these other girls' conversations. They were underwear sales people.

Q. How large a counter is this underwear department?

A. The Palais Royal underwear department?

Q. I am not familiar with Washington, so I do not recognize it by name.

A. It is a large department store, and it is a very large section of their store.

Q. Again, you say you asked for wool underwear. Did you ask specifically for all-wool?

A. No. I did not shop in the Palais Royal. I just talked with the salesladies.

Mr. FRANCE. I think that is all.

Mr. CLARK. That is all.

Examiner McKEAG. That is all, Miss Marshall.

(Witness excused.)

Examiner McKEAG. We will adjourn now until Thursday,  
645 December 2nd, 1920, at 10 o'clock, at the office of the Federal Trade Commission in New York, subject to definite notice. (Whereupon, at 3 o'clock p. m., an adjournment was taken until Thursday, December 2nd, 1920, at 10 o'clock, a. m., at the New York office of the Federal Trade Commission.)

646 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION	}	Docket No. 214.
vs.		
WINSTEAD HOSIERY COMPANY.		

648 NEW YORK, N. Y., December 2, 1920, 10.30 a. m.

Met pursuant to adjournment.

Appearances same as before.

R. T. URQUHART was called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live?

A. 220 West One hundred and seventh Street.

Q. Do you recall receiving from the Federal Trade Commission a letter in the form of a questionnaire as to your understanding of certain terms that were applied to underwear?

I do, sir.

649 Q. I think you stated there——

Mr. MOLLOY. I object to what he stated in the paper.

Q. What is your occupation?

A. Traveling salesman.

Q. You have had some experience personally in buying underwear from time to time?

A. I have.

Q. You observed the selling of underwear in stores?

A. Certainly when I bought it.

Q. I asked you if you had had any experience in buying it.

A. Yes, sir. You don't think I go around without underwear.

Q. Well, your wife might have bought it for you.

A. No. I am a man and a man's man. I do my own purchasing.

Q. And if you saw labels on the box marked "natural wool," what would you expect the material to be?

A. I would expect to find an all-wool garment.

Q. Suppose the box is labeled "natural merino"?

A. Well, everyone knows merino is a sheep and I would think it was all wool, but a different make.

Cross-examination by Mr. MOLLOY:

Q. Have you ever gone into a store and asked for woolen underwear?

A. No.

650 Q. Have you ever gone into a store and seen the word "Merino" on any of the underwear that was there before you?

A. No.

Q. Have you ever bought underwear made by the Winsted Hosiery Company?

A. Not that I know of. I couldn't swear to that. I use Munsing.

Q. You say you have had no experience in buying underwear marked merino underwear?

A. No, sir.

Q. When was the first that you learned of the word merino?

A. When I was able to creep I heard my mother and father and other members of the family speak of it, and I remember that it was a sheep.

Q. Have you ever seen a merino sheep?

A. No.

Q. You have seen sheep?

A. Yes, but I never designated any of them as merino sheep.

Mrs. HARRIETT M. EDMOND was thereupon called as a witness, and having been duly sworn, testified as follows:

651 Direct examination by Examiner McKEAG:

Q. What is your name?

A. Mrs. Harriett M. Edmond.

Q. Address?

A. Address, 301 West Ninety-sixth Street, New York City.

By Mr. CLARK:

Q. Do you remember receiving this?

A. Yes, I received that and replied to it.

Q. Have you had some experience?

A. I have had no experience in buying woolen underwear. None, absolutely none.

Q. So, may I ask on what you base this?

Mr. MOLLOY. I object. The witness has stated that she has no experience. Now, you can put a question as to what you asked her in there, but not to examine her on that paper.

The WITNESS. That was not personal experience. It was my opinion as to what should be expected when a person claims to have the material all wool. But my personal experience is nothing.

Q. What is your understanding of the meaning of the term merino?

652 A. I should think merino meant better wool from the merino sheep.

Q. And the term worsted?

Mr. MOLLOY. I object to that.

A. Worsted is pure wool.

Mr. MOLLOY. I object to asking the witness what her opinion is on these terms without—when her testimony shows that she has had no experience with underwear of this kind.

The WITNESS. I have had no experience whatever.

Mr. MOLLOY. You are asking for an opinion.

Examiner McKEAG. She may answer subject to counsel's objection.

Mr. CLARK. I want to state for the record that this question is not addressed to her opinion except as a private citizen.

That is all, Mrs. Edmond.

Cross-examination by Mr. MOLLOY:

Q. You have had no experience whatever in buying woolen or merino underwear?

A. I have not.

Mr. MOLLOY. That is all.

653 Mrs. W. T. POTTLE was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Please state your full name and address.

A. Mrs. W. T. Pottle, 957 Madison Avenue.

By Mr. CLARK :

Q. Mrs. Pottle, you recall receiving this by mail?

A. I do.

Q. And let me ask you if you have had experience personally in buying underwear?

A. Yes.

Q. And what is your understanding of the meaning of the term "Merino" as pasted on a box containing underwear, as to the quality of the garment?

A. Pure wool.

Q. And as to the term "Natural worsted"?

A. Pure wool.

Q. And the term gray wool?

A. Wool.

Q. And natural wool?

A. Wool.

Mr. CLARK. I think that is all.

654 Cross-examination by Mr. MOLLOY :

Q. Mrs. Pottle, you say you have had experience in buying woolen underwear?

A. Yes.

Q. When?

A. Beg pardon?

Q. When was the experience that you had?

A. Very little a good many years ago, perhaps fifteen years ago.

Q. In what capacity?

A. Personally.

Q. For your own use?

A. Yes.

Q. Have you had any experience since then in buying woolen underwear?

A. No.

Q. So that in answer to counsel's questions on direct examination these answers were of experience of some fifteen years or more ago?

A. They didn't relate to experiences. He simply asked for opinions.

655 A. Have you seen any woolen underwear or underwear of any kind marked in the manner described by his questions, in the last fifteen years?

A. I can't answer that. I should not remember if I had seen it. I have no recollection.

Q. Have you ever heard of the word "Merino" meaning a mixture of cotton and wool?

A. Not to so understand it.

Q. When did you hear that it was a mixture of cotton and wool?

A. I never heard that; not to understand it; no.

Q. You say your understanding of the meaning of the word merino is that it is all wool?

A. Yes.

Q. Where did you get that knowledge from?

A. From my childhood, when merino was one of the normal things that the family wore.

Q. If there was any doubt in your mind as to the meaning of the word, what effort would you make to correct a possible error?

A. I should go to the unabridged dictionary, I think, and look it up.

Q. And if you had gone to Webster's unabridged dictionary to look up the word merino or balbriggan, and found that merino as there defined is a mixture of cotton and wool, your testimony here might have been different?

A. Yes.

Q. And if you had so found, you would have testified that your understanding would be that it was a mixture of cotton and wool?

A. I should say that that was the modern interpretation if I found it in Webster's Dictionary.

Q. Take the word mohair. You have bought fabrics known as mohair?

A. Yes.

Q. What is your understanding of that word?

A. It is part cotton, you will be told. You get one and it does not last, and you are told that it is cotton.

Q. And if you found that mohair is stated to be a fabric made by the Moors of Spain, you would not expect that the mohair that you got was made by the Moors of Spain?

Mr. CLARK. I object to this line of examination as simply encumbering the record.

Examiner McKEAG. Counsel, as I understand it, is entitled to reasonable latitude to ascertain the foundation of the witness's knowledge of terms used in the textile industry. I will permit him to continue.

Mr. CLARK. It is not proper cross-examination.

Examiner McKEAG. To a certain extent it is and to a certain extent it is not.

Q. Now, when you got the questionnaire, did you look up any of these terms in the dictionary?

A. I looked up balbriggan.

Q. Now, does that not indicate somewhat of a doubt as to your own knowledge of the word merino?

A. No; I should think not. I don't think my doubt of one word means doubting the other.

Q. Why did you look up balbriggan?

A. I thought I knew what merino and all wool meant, but I did not know about balbriggan.

Redirect examination by Mr. CLARK:

Q. Suppose, in addition to the Webster's Unabridged Dictionary, you looked into Century and Universities' dictionary and found



that they defined merino as all wool, you would be confirmed in your first opinion, would you not?

A. Yes.

Mrs. F. J. AENDERT was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

658 Q. Give your full name to the reporter.

A. Mrs. F. J. Aendert, 53 West 130th Street.

By Mr. CLARK:

Q. You received this letter, didn't you?

A. Yes.

Q. Have you had experience in the purchase of underwear, men's or other?

A. Well, I purchased for myself, about seven or eight years ago, woolen underwear at Stearn's.

Q. If you were looking for underwear and was in a store and saw a box labelled "natural merino," what would be your impression as to the contents of the box?

A. Well, I should think it was woolen underwear.

Q. And suppose it were labelled natural worsted?

A. Well, I should expect that to be wool.

Q. And gray wool?

A. Yes.

Q. And merino alone?

A. Yes; that would be very fine wool. I should judge.

Q. Have you had any experience in handling it as saleslady?

A. Years ago, in my vacation, I spent part of my time in a store.

Mr. CLARK. That is all.

659 Cross-examination by Mr. CLARK:

Q. Where did you work as saleslady?

A. Well, years ago in Davenport, Iowa, a store called Peters'.

Q. Did you ever hear of the word merino as a mixture of cotton and wool?

A. No; I never did.

Q. Did you handle any all-wool garments out there?

A. Yes.

Q. How were they marked?

A. Well, generally they were very fine, and were marked Merino.

Q. What product did you handle?

A. Well, I could not tell now, it was so many years ago; I was quite a school girl.

Q. How many years?

A. Something like twenty-five. Twenty-five to thirty years.

Q. How long were you employed there—just during the summer months?

A. Yes; off and on.

Q. And since then you have had no experience except these purchases you have made years ago?

A. Yes.

660 Q. And that is the only experience you have had since you served as a saleslady?

A. Yes; except that I have bought woolen things for babies' socks for friends.

Q. But, so far as the use of the word merino is concerned, your experience goes back to 25 years ago?

A. Well, I know that merino is the wool from a sheep.

Q. How do you know it?

A. Well, I know it from my school days; I have known it from pictures.

Q. What picture?

A. Well, the ordinary pictures.

Q. Unabridged Webster?

A. Yes; I know it from that, and I know it, as I say, from school days.

Q. But you do know it from the meaning as defined in the unabridged Webster?

A. Yes.

THOMAS L. DICKINSON was thereupon called as a witness, and having been duly sworn testified as follows:

Direct examination by Examiner McKEAG:

661 Q. Give your name and address.

A. Thomas L. Dickson, 36 Gold Street, New York City.

By Mr. CLARK:

Q. You received this letter, Mr. Dickson?

A. Yes.

Q. In the form of a questionnaire?

A. I did.

Q. Do you personally buy your own underwear?

A. Yes.

Q. In going to a shop, assuming that you were looking for underwear and saw on the shelves boxes in the underwear department labelled natural merino, what would you think was the quality of the garment?

A. All wool.

Q. And if they were labelled simply wool?

A. All wool.

Q. Natural worsted?

A. All wool.

Q. Gray wool?

A. All wool.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

If you saw a garment marked "balbriggan," what would  
662 you expect to get? What is balbriggan?

A. I don't know.

Q. How is it you don't know what the meaning of the word bal-  
briggan is and yet you know merino?

A. Well, merino is a wool and spun from the merino sheep or  
sheep with a long fleece. Balbriggan is balbriggan.

Q. Is it not made from the short staple of the wool?

A. I don't know.

Q. If you saw lisle what would you expect?

A. I don't know technically what it is.

Q. I am not asking technically; I am asking from your knowledge  
of what these words mean.

A. I would take it as they gave it to me and wear it.

Q. What would you understand you were receiving if you got a  
worsted garment?

A. Wool.

Q. And a garment marked wool?

A. Wool.

Q. Would there be any difference in the two fabrics?

A. No; I don't know how they differentiate.

Q. There would be no difference between a garment marked wool  
and a garment marked worsted?

663 A. Worsted, as I understand it, is spun from the long fleece;  
that is, a longer fleece than the ordinary wool.

Q. The difference would be that the wool would be spun from  
the short staple and the worsted from the long staple?

A. As far as I understand it.

Q. If you asked for gingham, what would you expect?

A. I don't know what gingham is.

Q. If you asked for cambric what would you expect?

A. Don't know what cambric is.

Q. If you asked for mohair?

A. I will have to figure that out a little.

Q. If you saw a garment marked cashmere, what would you  
expect?

A. Cashmere has something to do with cashmere sheep or goat or  
something.

Q. And if you saw a garment marked cashmere you would expect  
to get a garment made of wool from the cashmere sheep?

A. No; if I get cashmere, I would take it as it was given to me.

Q. In other words, you would take it on faith that it was cash-  
mere?

A. Cashmere—that is too technical for me.

Q. Did you ever buy a garment made partly of cotton and partly  
of wool?

A. Not to my knowledge.

664 Q. Never have?

A. Not to my knowledge.

Q. Can you tell a garment made partly of wool and partly of cotton?

A. No, sir.

Q. Then why did you say you never bought a garment containing part cotton and part wool?

A. Because I don't know it if I have.

Q. Have you ever bought a garment made of all wool?

A. Yes.

Q. How do you know?

A. Let's see what all wool is—yes, I have.

Q. How do you know?

A. Well, I tell you, it was knitted from the fleece of a sheep in Maine by a farmer friend of mine.

Q. It was something done privately?

A. Yes. Woolen socks, it was.

Q. It was not something that you bought in the store?

A. No.

Q. Do you wear woolen underwear?

A. Not this morning.

Q. What occasion have you had for going into underwear shops and asking for underwear of any particular make?

665 A. Why, to replenish my stock that is all, to buy a new suit.

Q. Have you ever gone into a shop and asked for merino?

A. No, not that I know of. I asked for a suit of woolen underwear.

Q. Have you ever seen any underwear marked "Merino" in the shops that you have gone to?

A. I could not recall.

Q. When did you receive this questionnaire?

A. It is not dated, I don't know when.

Mr. CLARK. I think I can tell you.

Examiner McKEAG:

Q. Approximately?

A. But I don't know.

By Mr. MOLLOY:

Q. Did you discuss with anybody the questions to be gone into at this hearing?

A. No, no.

Q. Did you refresh your recollection by any means?

A. No, no.

Q. What is your business?

A. Manufacturer of precision tools.

Q. In business for yourself?

A. Yes, sir.

Q. At what address?

A. 36 Gold Street.

666 Q. If you went into a store and asked for Sheffield plate, what would you expect to get?

A. Sheffield plate.

Q. If you went in Tiffany's or Gorham's or any other silver-smith's and asked for Sheffield plate, what would you expect to get?

A. What I asked for.

Q. If you went into one of these shops and asked for Sheffield plate, what would you expect to get?

A. Sheffield plate.

Q. Would you explain the meaning of "Sheffield plate?"

A. Don't know.

Mr. MOLLEY. That is all.

Mr. CLARK. The date is November 12th.

WILLIAM HICKS OSGOOD was thereupon called as a witness, and having been duly sworn testified as follows:

By Examiner McKEAG:

Q. What is your name and address?

A. William Hicks Osgood, 56 West Eleventh Street.

Direct examination by Mr. CLARK:

Q. You recall receiving that and filling it out as it stands?

667 A. Yes, I do.

Q. Suppose you were looking for underwear, and went into a shop and saw on the shelves boxes bearing labels "Natural merino," what would you infer as to the quality of the garments in the box?

A. I would infer that it was wool.

Q. All wool?

A. Yes, I would.

Q. And suppose it bore the term "Natural wool," what would you think?

A. I would assume it was all wool.

Q. And the term "Natural worsted?"

A. I would assume that was all wool.

Q. And "Australian wool?"

A. All wool.

Q. And the term "Merino" alone?

A. On the term merino, I must admit that I would be in a little doubt, but I would assume that was all wool.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. What would be your doubt as to the meaning of the word merino?

668 A. Well, it is in my mind that it is wool, and therefore I would think it was all wool.

Q. Why did you differentiate that there would be a doubt in your mind as to the meaning of the word merino, but no doubt as to the meaning of the word "Natural merino"?

A. Natural merino would sound to me the same as natural wool, and, in that case, I would feel that was all wool.

Q. And when it was used alone would it indicate to your mind that there was another substance there?

A. It would not indicate that.

Q. Have you ever heard that merino is a word used to designate a mixture of wool and cotton?

A. No.

Q. Have you ever bought any merino underwear?

A. Never.

Q. Did you ever buy woolen underwear?

A. I use cotton.

Q. Did you ever buy any wool, all wool, worsted, or merino?

A. Never in my life. I presume I have seen boxes, and, in fact, these terms are familiar to me as terms, but I have never gone into a store for the purpose of purchasing woolen underwear.

Q. If you went into a store and asked for cashmere under-  
669 wear, what would you expect to get?

A. I would expect to get all wool. I am not very familiar with that term.

Q. And if you asked for lisle, what would you expect to get?

A. Cotton.

Q. If you asked for balbriggan, what would you expect to get?

A. Cotton.

Q. Have you taken occasion, since the receipt of this questionnaire, to look up the meaning of the word merino?

A. No.

Q. When did you obtain your first knowledge of the word merino?

A. That would be impossible to say. I don't know.

Mr. MOLLOY. That is all.

Redirect examination by Mr. CLARK:

Q. One more question. Not being a woman, I suppose you have no objection to telling us what your age is?

A. Thirty.

Mr. CLARK. That is all.

LOUIS ETTLINGER was thereupon called as a witness, and having been duly sworn, testified as follows:

670 Direct examination by Examiner McKEAG:

Q. What is your full name?

A. Louis Ettlinger.

Q. Your address?

A. 40 East Seventy-third Street.

By Mr. CLARK:

Q. Mr. Ettlinger, you recall receiving that letter?

A. Yes.

Q. And filling it out?

A. Yes.

Q. And that is your signature?

A. Yes, sir.

Q. Let me ask you, Mr. Ettlinger, in case you were seeking to purchase some underwear, and in the store where you went was a box on the shelves in the underwear department labeled "Merino," what would be your impression as to the contents?

A. Well, my impression would be that the underwear is made from merino wool and therefore is wool.

Q. And entirely of wool?

A. Entirely of wool.

Q. Suppose the box had another label "Australian wool" what would you think?

671 A. I would think it is wool.

Q. And gray wool?

A. Wool.

Q. And natural worsted?

A. That is wool.

Q. Have you been in the custom of buying your own underwear?

A. No; Mrs. Ettlinger does that for me.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. If you went into the foot-wear department and bought a pair of rubbers would you expect them to be all rubber?

A. Rubber? Well, I would expect to get rubber shoes, yes.

Q. Get all rubber?

A. Well, it has to have other ingredients to make it fit for shoes.

Q. Did it ever occur to you that in making an underwear garment it required other ingredients beside wool to make the fabrics—according to the prices?

A. No. It should be wool and nothing else. Otherwise, it should say so.

Q. What kind of underwear do you use—all wool?

672 A. I use in summer either cotton or a light silk, and in winter a heavy silk.

Q. Any wool garments?

A. Yes, socks.

Q. Any underwear?

A. No.

Q. Have you had any experience in buying all wool underwear?

A. Not personally, no.

Q. What is your business?

A. Linotyper. Printing.

Q. So that your impression of the meaning of these various words and what the fabrics should contain, in your opinion is derived entirely—is not from any personal experience you have had in buying fabrics?

A. No.

Q. Have you ever heard of the word merino, meaning a garment made partly of cotton and partly of wool?

A. No; I have not.

Q. Never heard that?

A. I only know merino is the fleece of sheep that were originally exported from Spain to Saxony and England and Australia, and that it is called merino wool.

Q. Where did you get that information from?

A. Well, from general information you read about.

673 Q. Did you look it up before you answered the questionnaire?

A. I looked it up in the encyclopoedia, merino, and it refers first to sheep, and then you look up sheep and it refers you to wool, and it explains the wool derived from the merino sheep, its texture and its length, its quality, and so on.

Q. You saw that in Encyclopoedia Britannica?

A. Yes.

Q. Eleventh edition, or the latest?

A. No, it is in the index of the edition before the last.

Q. I read to you from the Encyclopoedia Britannica, eleventh edition. The article concludes "in the hosiery"—

Mr. CLARK. Now, for the sake of the record—

Examiner McKEAG. He is reading it for the basis of a question.

Q. In reading the account of the meaning of the word "merino" in the Encyclopoedia Britannica did you see this description of the word, reading as follows: "In the hosiery and remanufactured materials trade the term merino is applied to fiber mixtures of cotton and wool in contradistinction to all-wool goods"?

A. I didn't read that; no.

Mr. MOLLAY. That is all.

Mr. CLARK. That is all, Mr. Ettlinger.

674 EDWIN HOYT UPDIKE was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Your full name?

A. Edwin Hoyt Updike. Residence, 30 East Thirty-fifth Street, New York.

By Mr. CLARK:

Q. Do you recall, Mr. Updike, receiving this letter in the form of a questionnaire?

A. Yes.

Q. And that is your signature?

A. Yes.

Q. You filled it out?

A. Yes.

Q. In case you were looking to buy underwear and were in a shop and saw on the shelves in the underwear department boxes labeled merino, what would you infer was the quality of the garments in respect of their contents?



A. Just the word merino?

Q. Yes.

A. I would understand that meant all merino wool, because I knew that merino is a kind of wool. That is what the word would mean to me.

675 Q. And if the box were labeled "Natural wool," what would be your inference in that respect?

A. Wool, as shown from the animal.

Q. And Australian wool?

A. Well, it would be wool shorn from a sheep in Australia.

Q. And "Natural worsted," what would worsted imply?

A. Well, it implies wool to me, too.

Q. What is your age?

A. I am thirty-eight.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. Have you ever bought woolen underwear, Mr. Updike?

A. Yes, sir.

Q. Do you wear woolen underwear?

A. Yes, occasionally, in winter time.

Q. All wool underwear?

A. I assume so; yes.

Q. Well, when you buy your underwear, don't you take some pains to ascertain whether the garment that you are purchasing is all wool or otherwise?

A. Why, sometimes I prefer to have some cotton with the wool.

676 Q. And have you ever bought any all-wool underwear?

A. I think I have; yes.

Q. And in asking for all-wool underwear, would you not specifically ask for an all-wool garment?

A. No; not necessarily.

Q. What would you ask for?

A. Well, I might ask for merino—I would ask for wool. Otherwise I would ask for cotton and wool.

Q. Have you ever gone in a store and asked for a merino garment?

A. Never that I recall.

Q. What would you expect to get if you saw a box marked balbriggan? What kind of a garment would you expect to get?

A. I would not know just what that was.

Q. Would not know it was a mixture of cotton and wool?

A. I would not know.

Q. And if you saw a box marked "Cashmere," what would you expect to get?

A. I would be doubtful about what the word really meant.

Q. And how is it you are positive if you saw a garment marked merino you would expect to get a garment made of all wool from the merino sheep?

A. Because I have been in Spain, and I am familiar with  
677 the type of sheep there known as merino.

Q. So when you hear the word merino, you naturally think of merino sheep?

A. I do, yes.

Q. And when asked about merino underwear you therefore naturally conclude it must be wool from the merino sheep?

A. Yes.

Q. So you have never heard the word used as meaning a mixture of cotton and wool?

A. No, never.

Q. Did you have occasion to look in any dictionaries as to the meaning of the word merino since you received this questionnaire?

A. No, I did not.

Q. Your knowledge of the meaning of the word was derived from your experience in knowing that there were sheep in Spain called merino?

A. Well, there are sheep in California called merino, too. The word merino, at least so far as it affects my mind, means wool from the sheep.

Q. And from a particular sheep?

A. From a particular kind of sheep: a special quality. Out of the ordinary.

Mr. MOLLOY. That is all.

678 EDWIN A. BRAND was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Your full name please?

A. Edwin A. Brand.

Q. Your address?

A. 41 Park Row.

Q. That is your business address?

A. Yes, Secretary of the Tanners' Council.

By Mr. CLARK:

Q. Do you recall, Mr. Brand, receiving that questionnaire?

A. Yes.

Q. And you filled it in and that is your signature?

A. Yes, that is my signature.

Q. Let me ask you: Suppose you were looking for underwear for your use and went into a shop and saw underwear in boxes labelled "Merino" what would you understand from that label on the box that the quality of the garment was?

A. Did you say wool?

Q. I said merino.

A. I would consider that to mean wool—all wool.

679 Q. And the term "Natural merino" would that be any different?

A. Well, as a layman, I should also consider that as pure wool.

Q. And the term "Australian wool" what would you understand that to mean?

A. Well, that being a most extensive market for wool, I would also consider that as all wool.

Q. And the term "Gray wool?"

A. Well, as a layman I should consider that also as pure wool.

Q. And "Natural worsted?"

A. That is wool also.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. Do you use woolen underwear?

A. Yes.

Q. And what kind of woolen underwear do your purchase?

A. I don't know. When I bought any in the past I would just call for all wool. I would call for woolen underwear and assume it was all wool.

Q. If you went to a footwear department and asked for rubbers would you expect to get all rubber?

A. Ask for rubbers and expect to get all rubber? Why, no, I don't think so.

680 Q. Well, why would you expect to get only partly rubber in the rubber department and expect to get all-wool garments when the garments were marked "Merino"?

A. Well, I suppose—I stated that I spoke as a layman; as an ordinary layman I would expect it. That is all the answer I could give to that. I don't think I could give any further reason.

Q. Don't you know that the word merino is used to describe a fabric made of part wool and part cotton?

A. No.

Q. Never heard of that?

A. No.

Q. You are in what trade?

A. Leather.

Q. In what department, what branch of the trade?

A. All leather; all branches.

Q. And what kind of leathers have you come in contact with?

A. Sole leather, calf, glazed kid, leather for pocketbooks, glove leather, every kind of leather.

Q. Have you ever gone into a store and asked for merino underwear?

A. No.

Q. Have you ever seen a box marked "Merino underwear"?

681 A. Casually; yes.

Q. When?

A. I don't know; I could not recall that. I should say three or four years ago, maybe.

Q. What would you expect to get if you saw a box marked "Cashmere"?

A. Cashmere?

Q. Yes.

A. I don't know.

Q. Do you in your leather trade deal with goat's hide?

A. Goatskins; yes.

Q. And you have been in that business for how long?

A. I am not a tanner, I am a technical man. I look after the economic work.

Q. Did you ever hear of a Cashmere goat?

A. I suppose there are some of the goatskins coming from India, from Cashmere. I never stopped to think of that. I never stopped to classify those. There are some common brands, like dyaks, that are more known to the trade.

Q. You do not know, then, that there is an article known as cashmere hair as generally known in the trade?

A. No; I am not familiar with it.

682 Q. Or Cashmere goats?

A. No; I am not familiar with the textile side of it.

Q. If you went into a store and asked, or saw an article marked "Balbriggan," what would you expect to get?

A. I don't know.

Q. If you went into a store and saw an article marked "Lisle" hosiery, what would you expect?

Answer. I don't know, again.

Q. Would you expect there would be any difference between the garment marked "Wool" and a garment marked "Worsted"?

A. No; speaking as a man who knows absolutely nothing about the technical side of the woolen industry, except what I have gotten in economic studies, and that amounts to nothing. In reality I should not know the difference; as a layman I should consider the terms synonymous.

Q. What occasion did you have for looking up the word merino before you came down here?

A. None at all.

Q. And yet you spoke with knowledge of the meaning of the word merino and confessed ignorance of the meaning of the words balbriggan and lisle.

A. No; I didn't attempt to speak of any term with  
683 authority. I spoke as a layman.

Q. You expressed your opinion of the meaning of the word?

A. I expressed my opinion of the meaning of the word as I would consider it as a layman merely, not as a technical man, at all.

Q. And at the same time professing ignorance of the words balbriggan, lisle, or cashmere?

A. Yes.

Mr. MOLLAY. That is all.

By Mr. CLARK:

Q. May I ask your age?

A. My age, 41.

MR. CLARK. Thank you. That is all.

(Whereupon, at 11:55 o'clock a. m., the hearing in the above-entitled case was adjourned to 2 p. m. on the same day.)

AFTER RECESS.

GERTRUDE MORRISS VERRALL was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Your full name?

A. Gertrude Morriss Verral.

684 Q. And your address?

A. Nineteen East Fifty-seventh Street.

By Mr. CLARK:

Q. You recall receiving this letter, questionnaire by mail?

A. Yes.

Q. And that is your writing, I take it?

A. Yes.

Q. I will ask you, Mrs. Verrall, if you were going to buy underwear and came to a shop, and in the underwear department saw a box displaying the label "Merino," what would you infer as to the quality of the garments in the box?

A. Well, I don't know much about those things; I don't know much about merino, but I always thought it was wool.

Q. Is that true as to the term "Natural wool?"

A. I should think that anything that said "wool," that said nothing else, would mean wool.

Q. All wool, you mean?

A. I think so.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. Mrs. Verrall, have you ever bought any wool underwear?

A. Not very often, because I don't like it.

685 Q. Have you ever bought any merino underwear?

A. I don't think I ever did.

Q. Have you ever seen a box displayed with the word merino on it, pasted as a label on it?

A. I don't remember that I have.

Mr. MOLLOY. That is all.

RICHARD S. JACKSON was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. What is your name and business?

A. Richard S. Jackson, advertising.

Q. And your address?

A. Two hundred and twenty-six Oak Street, Weehawken Heights.

By Mr. CLARK :

Q. Where are you at present employed?

A. B. Altman & Co.

Q. How long have you been connected with that house?

A. Thirty-two years.

Q. And will you state a little more definitely your present employment there?

A. My present employment is advertising manager, and I am also on the board of directors.

686 Q. Will you state a little more in detail your duties as advertising manager as relates to the use of the terms on underwear?

A. Well, all of these propositions pass under my direct control after they are sent from the buyers of the establishment. In other words, I am responsible for what our policy is in just such a subject as you are speaking of now.

Q. And your duties?

A. Preparing advertising, sending it to the newspapers, magazines and so on, or have others doing that under my direction.

Q. Do your duties then involve making yourself acquainted with the public understanding of terms as well as the trade terms? That is, the trade meaning of terms used in the description of garments and so on?

A. Not the trade meaning in the sense of manufacturers or jobbers, but trade meaning in the sense of the public; what the public might ask for.

Q. That is, there are two parties to a sale that goes over the counter: the purchaser and the retailer. Has your business been such as to make you acquainted, in your opinion, with the interpretations customers give to terms?

A. Well, perhaps I had better explain this. The man who 687 buys the goods is expected to know how these goods should be described in selling them to the customer.

Q. You are speaking now of the buyer for the retailer?

A. Yes. He is supposed to be familiar with that. When purchases reach me I make it my business to make what inquiries may be necessary in order to make that merchandise clearly understood to the ultimate consumer. Now our buyers are well instructed as to what is expected of them before placing merino underwear, for instance, before the public, and it is very seldom that I have to go into the matters; at the same time if any question came up I would investigate it.

Q. Now, as a fact in carrying out your investigations, you had occasion to pass upon the use of the word merino as applied to underwear?

A. No.

Q. You never use the term in Altman's store?

A. No sir; we don't use it.

Q. Have you ever used it there?

A. To the best of my knowledge, no. We use it sometimes; we may speak of it in conversation, but in placing a proposition for underwear before the public, I have made it a practice, and this  
 689 is in line with the policy of the house, to describe merchandise in such a way that the customer will have a direct idea of what is going to be placed on sale. I know personally that very few people in our establishment ask for merino underwear, and I state this because during a long term of years I have made it my business at different times to find out just what customers do ask for in order that such things can be placed before them, and we find that they will ask for wool underwear, or silk, or not too heavy; or cotton, more or less. The subject in their mind is one of wool or cotton or silk, and so on, because they are in the habit of wearing that particular kind, and in line with that when we place information before the public we describe it as wool underwear if it is wool, and wool and cotton if it is wool and cotton. Sometimes we get articles called merino and we would place that before the public as wool and cotton; or if it is cotton, we describe it as cotton underwear.

Q. What do you understand personally the meaning of the word merino to be, aside from any trade understanding?

A. Wool.

Q. What is your idea that the public or any part of the public understands by the term merino aside from any instructions they may receive?

689 Mr. MOLLOY. One moment. I object on the ground that the witness has shown no qualification to answer that question.

Examiner McKEAG. He may answer, subject to objection.

A. I don't think that the public generally knows, and I may add that I have made it a practice to ask different people about various things that might occur to me as their being in doubt about in the public mind, with the object of placing that article in such a light that the readers would clearly understand what was meant. And in my experience I have found that people don't generally know what merino means. I have asked people what is your idea of merino? "Wool and cotton, I guess." I don't even find people saying wool. Personally I know that merino is wool and I have no doubt a great many other people, but the usage has evidently changed.

Q. Have you ever heard any one of the buying public say that it was all wool?

A. No, sir. As I say, people at our own store would not be likely to come in and ask for merino when we specifically state in our advertising that it is either wool and cotton or wool or cotton or whatever it may be. But people coming to the counter not in response  
 690 to the advertising, it is possible they would ask for merino, but to the best of my knowledge such cases are very infrequent, and whether they would know what they meant I am not prepared to say, because that would require close questioning. Of course in my own family they are perhaps a little better familiar

with the term merino than perhaps in a section like this where perhaps terms change from usage and so on.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY.

Q. When the word merino is used in connection with underwear, when underwear is described as merino underwear, you understand that to mean underwear made of a mixture of cotton and wool?

A. I know that that is the general understanding of that, but personally I know that is not the case except in an individual case, but if I saw something advertised as merino underwear, I should judge that it was a mixture of cotton and wool, because most of the announcements are such; but speaking of myself personally, I would not advertise it as merino underwear.

Q. When you advertise rubber shoes, do you describe it, do you state the fact that they are partly manufactured of rubber and partly of cotton?

A. Well, we don't have sales of rubber shoes.

691 Q. When you sell rubber goods do you state in your advertisement that it is partly of rubber and partly of cotton?

A. We advertise that as a rubberized material which would give the idea that it is rubber in that.

Q. When you advertise camel's hair fabrics, like shawls or underwear, do you describe it as something containing other than camel's hair?

A. That would raise a question—

Q. I ask you whether you do or do not?

A. I have not advertised it recently.

Q. You have not? Just refresh your recollection on that. Within the last two weeks?

A. Yes; we have had something like that.

Q. And you have advertised that without any modification in its description?

A. Yes, I think so.

Q. And don't you know as a matter of fact that it is not 100% camel's hair?

A. Well, technically, I don't know. I know that camel's hair and most fabrics need something to steady it; to back it up.

Q. Don't you know that a fabric could not be made up entirely of camel's hair?

692 A. Yes.

Q. And the garments that you have been advertising as camel's hair sweaters—don't you know that they contain other articles than camel's hair?

A. It would be expected that there would be some other material there in the garment as a basis.

Q. In your advertising you don't say anything like that?

A. No.



## Redirect examination by Mr. CLARK:

Mr. CLARK. I ask permission to extend my examination.

Q. Has your business given you an observation and knowledge of the practice of other retailers in relation to the representations they make as to the quality of goods including underwear?

A. In a general sense, only.

Q. Well, you are interested, are you not, in knowing whether your goods are on a fair basis of competition with others?

A. Yes, sir.

Q. What is your observation as to the practice of any retailers in the use of the term merino as applied to underwear, in respect to their representations as to the quality of the goods so labeled?

693 A. I can not answer that question, because that is not under my control. If it were, I would be prepared to answer it. I can only answer for our own house.

Q. Well, then, you have no observation as to the use by retailers except yourselves of the use of such terms in the sale of underwear?

Mr. MOLLOY. Just one moment. Read that question, Mr. Stenographer.

(Question read as above recorded).

A. All I can say in answer to that is that the term "Merino wool," to my knowledge, is very different and it would be hardly likely to be real merino, but as I say again, I can not answer for what some other house does. We try to get our merchandise equal to or superior than other houses. We have used the word merino in years past, but we have not dropped it because there was anything definitely wrong about the use of the word, but as I say, from usage the meaning of certain terms has changed, and my policy has been, that if a thing can be described clearly, so people will know exactly what they have to expect, we do it. We want the confidence of the public, and if we told them we had a certain thing and describe it, it doesn't follow that some other way is wrong, but we feel that we are  
694 getting more response from our way. We try to make it clear.

Q. And using other terms than merino you think increases the clearness?

A. Yes.

Mr. MOLLOY. I object to that as incompetent, irrelevant and immaterial.

Examiner McKEAG. He may answer subject to your objection.

The WITNESS. I don't say that it increases the clearness, but I say that it follows our policy as to what we think makes it very clear—

Mr. CLARK. That is enough. You don't need to enlarge on that.

The WITNESS. Will I enlarge on it?

Mr. CLARK. You can if you want to, but I am only expressing the opinion that that is sufficient for the purpose.

## Recross examination by Mr. MOLLOY:

Q. Let me ask, Mr. Jackson, from your knowledge of the retail trade covering underwear, is it or is it not your opinion that the

term merino displayed on boxes on the shelves of retailers may lend itself to misrepresentation by the retailers of the quality of those goods in respect to their wool or cotton content?

695 A. No, sir; I don't think so.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

A. G. ZIMMERMANN was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Your full name.

A. A. G. Zimmerman, 85 Ninth Avenue, New York City.

By Mr. CLARK:

Q. Do you recall receiving this?

A. Yes, sir.

Q. And you filled it out and that is your signature?

A. Yes, sir.

Q. It is a questionnaire as to your understanding of certain terms?

A. Yes; I want to say that I am a jobber and I don't buy much of that stuff, but I would expect the thing to be whatever it is labeled.

Q. And if you had purchased some underwear—went into a shop to buy it—and you saw on the shelves boxes labeled “Merino,”  
696 what would you infer was the content?

A. I would expect it to be just what it is marked.

Q. And what is that?

A. That is wool; merino wool, yes.

Q. And what do you understand by the label “Natural worsted?”

A. Well, I would not be sure, but I would think it would be wool.

Q. Well, how about natural wool?

A. Well, I would surely think that would be wool.

Q. And Australian wool?

A. I would naturally think that would be wool.

Cross-examination by Mr. MOLLOY:

Q. Would you be absolutely sure that the article marked merino was all wool, or only part wool and cotton?

A. Well, I would expect it to say so; yes.

Q. The word merino would indicate to you an all-wool garment?

A. Yes.

Q. What business are you in?

A. Retailer.

Q. Have you ever bought any merino underwear?

A. I don't think so. I used to buy wool some years ago. I don't wear it now.

697 Q. You have not bought merino underwear?

A. No; not recently.

Q. And not having bought any, you have never seen goods marked “Merino.”

A. No—well, I—no; I don't think I remember if I did; I would not pay any attention to it.

Q. In receiving this set of questions, did you have occasion to look up the meaning of the word merino?

A. No; I judge from that they want the general impression of the public on these things, and in my business I expect everything to be as it is marked. If a barrel of oil is marked "Linseed" I expect it to be pure linseed oil.

Q. Now, if a garment was marked Cashmere, what would you expect it to be?

A. I would expect Cashmere wool; yes.

Q. And if an article was marked camel's hair, what would you expect?

A. I would expect it to be one hundred per cent camel's hair, or they ought to say what percentage of adulteration is in it. If it is gold I would expect them to say 14 karat or 18 karat or whatever it is.

Q. If you saw an article marked balbriggan, what would you expect?

A. Well, I am not very familiar with all of those terms. I would not know just what balbriggan is, myself.

Q. And if there was any doubt, what would you do?

A. I would ask the clerk what it is.

Q. Well, if he was not available and the dictionary was?

A. I would not bother about it. I would not trouble about it.

Q. Well, if you wanted to be enlightened?

A. I don't get enough of them to bother about it.

Q. Well, if there was any doubt about any word, and you wanted to satisfy yourself about it what would you do?

A. Certainly, I would look it up.

Q. And if the word "Merino"—if you took a common dictionary like Webster's Unabridged, and you saw there that merino was described as a mixture of cotton and wool, that might indicate to you that the public so understood it to be a garment made of a mixture of cotton and wool?

A. Well, of course, when you come to a mixture, I am not acquainted at all. You have got about the most foreign matter here you could pick out. But if it was in my line, and there was anything that was supposed to be a mixture I would always want the percentage.

Q. Well, you are in the habit of calling for specifications?

699 A. Yes; and I make analyses also. When we want to know what mixture is in a thing we make an analyses and find out.

Q. Well, now, take a desk like mahogany or oak, as that term would be understood. You know that as a matter of fact that desk may not be one hundred per cent mahogany.

A. Well, if it is made according to our specifications.

Q. Well, I am speaking as the general public would understand it. You might sell as mahogany and only be a veneer?

A. Yes.

Mr. MOLLOY. That is all.

GUSTAVE E. BLISS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. The name is Gustave E. Bliss, 156 Broadway?

The WITNESS. That address has been changed to 280 Badger Avenue, Newark.

By Mr. CLARK:

Q. Do you recall receiving that by mail?

A. Yes, sir.

Q. And the writing on it is yours?

A. Yes.

Q. You purchase underwear for your own use, Mr. Bliss?

700 A. Yes.

Q. Suppose you were going to purchase a few, and you went into a store where on the shelving they displayed boxes containing underwear with such labels known as "Natural merino" what would you infer from the label was the quality of the garment?

A. Why, I would be inclined to say that it was wool.

Q. And suppose the label was "Australian wool"—what would you think then?

Q. Why, I would think it was wool also.

Q. Do you mean all wool?

A. Well, I don't know. I would question my judgment on that.

Q. Suppose the label was "Natural wool." What would be your impression as to the quality of the goods?

A. I would say it was a wool garment.

Q. Well, as far as you can, if you have any idea about it, please distinguish between its being part wool and all wool. Is your impression that it would be all wool or only part?

A. Why I would say all wool.

Q. Does that apply to the term "Merino?"

A. I would say the same thing.

Q. And as to the term "Natural wool?"

A. I would think it is all wool.

701 Q. Are you a user of wool underwear?

A. Not for myself; no, sir.

Q. Have you had any occasion to buy wool underwear?

A. Yes, sir.

Q. Did you attempt to get all-wool underwear?

A. Why, I have just recently had a good case of that for my children. The boy has asthma and bronchitis, and a certain brand of wool garment was recommended, presumably because it was medicated or something like that. After discovering that it was not, I purchased very heavy garments, but was told at the time that they were not all wool. In other words, the explanation was made that they were not all wool.

Q. And so the salesman, in displaying his merchandise, acquainted you with the fact that the garment that was marked wool, was not, as a matter of fact, all wool?

A. I would not say that. The question was put whether it was 100 per cent wool. The information was not given voluntarily.

Q. Did you ask for an all-wool garment?

A. Why the discussion was brought out as to whether or not it contained all wool.

Q. And he told you it did not?

702 A. Yes, sir.

Q. Who asked the question?

A. Why the purchaser.

Q. And you were the purchaser?

A. Yes, sir.

Q. So that there was a doubt in your own mind in looking at the garment which was presented to you as being a wool garment whether it was 100 per cent wool?

A. Why yes; I should say it was.

Q. In other words, it must have been, because you asked the question?

A. Yes.

Q. And you say that the garment was marked wool?

A. Yes.

Q. So why did you—you testified on direct examination that when you saw an article marked wool that you would expect a garment to be 100 per cent wool?

A. Why I would believe that would be the impression they intended to give, but not accepted by me.

Q. In other words, then, you didn't believe it was one hundred per cent?

A. No, sir.

703 Q. And the same way with merino. If you saw an article marked merino, the marking of it merino would not indicate to you that it was one hundred per cent wool, would it?

A. Why, I would say no; but I would like to qualify that by saying that I would accept that for advertising, as a general rule, for what it was intended to convey.

Q. Have you ever purchased merino underwear?

A. No, sir; not that I recall.

Q. Then why did you state that it is your understanding that the word merino would indicate to you that it would be one hundred per cent wool?

A. Well, I would say that if a man would say that a garment was merino he would be referring to a certain kind of wool.

Q. And that the garment would be one hundred per cent made of wool?

A. I would presume that would be what it was.

Q. What would you expect to receive if you purchased an article marked cashmere?

A. Why, I don't know.

Q. What would you expect to receive if you asked and had offered to you a garment marked lisle?

A. As far as wool or cotton is concerned, I could not say.

704 Q. What would you expect to receive if you saw a package or garment marked "Balbriggan," as to its contents?

A. Why, I guess about the same as the others. I don't know.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

(Whereupon, at 2.50 o'clock in the afternoon, December 2, 1920, the hearing in the above-entitled case was adjourned to December 3, 1920, at 11 a. m.)

705 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY.	

707 NEW YORK, N. Y., *December 3, 1920—11.12 a. m.*

Met pursuant to adjournment.

Appearances same as yesterday.

LINCOLN CROMWELL was called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Give the reporter your full name.

A. Lincoln Cromwell, 357 Fourth Avenue, New York City.

By Mr. CLARK:

Q. Mr. Cromwell, what is your business?

A. I am commercial banker.

Q. Any other business?

A. No. That is a fair explanation of my business.

Q. With what firm are you connected?

A. I am a partner of William Iselin & Co. They also act—in addition to their banking business they are selling agents for a number of knitting mills.

Q. Are you a member of the knit goods manufacturers of America?

708 A. I am.

Q. Are you an officer of that association?

A. No.

Q. Have you been?

A. No.

Q. Are you familiar with the extent of the membership in respect of the industries represented?

A. In a general way I am; yes.

Q. Can you state the number of members?

A. My impression is that they have about 150 members. I have never been on the executive committee, and I have only heard their reports. It is a very representative group.

Q. It is composed of representatives of one distinct industry, and what is that?

A. Yes; of the knitting mills who manufacture underwear.

Q. Can you state approximately what proportion of the whole number of such manufacturers in the country are members of this association? Yes or no, can you?

A. Why, by number I should think that it probably was not over one-fifth of all the mills. But by product I should say offhand that it was considerably more than a half in value. The net business is made up of comparatively small number of very large plants and a very large number of very small plants, the small plants buying the yarn and making a class of underwear which is not represented in that association, and, as I understand it, is not at all involved in this Federal trade investigation, because the small mills are mostly manufacturers of women's cotton underwear, which can be made in an attic of a house or loft or a barn.

Q. Well, then, as to the whole number of manufacturers of men's underwear, what proportion would you say that this association represented?

A. I am merely making a very vague guess. I would say it represented 75 per cent.

Q. Do you recall a meeting of this association held on November 12, 1919?

A. I do.

Q. Where was that held?

A. At Utica, N. Y.

Q. Was it a general convention of members of the association?

A. It was; semiannual convention.

Q. And was there action taken during that meeting by the association on the subject of underwear?

A. There was.

710 (Several typewritten papers were thereupon marked "Commission's Exhibit 9" for identification.)

Q. I show you this typewritten paper, consisting of several sheets, marked "Exhibit 9," and ask if that is a correct copy of resolutions referring to the action you spoke of?

A. It seems to be a true copy of the resolutions regarding labeling which were adopted by the convention.

Q. Do you know as to the vote of the members of the association present at the time of this resolution?

A. It was unanimously in favor of it.

Mr. CLARK. No objection to this, is there?

Mr. MOLLOY. No.

(The paper previously marked "Commission's Exhibit 9" for identification was thereupon received in evidence, marked "Commission's Exhibit 10," and is forwarded herewith.)

Q. Was there a meeting of this association on November 18, of this year?

A. There was.

Q. Where was that?

A. At Utica, N. Y.

Q. And was action taken by the association at that time in reference to this same subject of labeling underwear?

711 A. Yes; a resolution was introduced, discussed, and unanimously adopted.

Q. I show you this paper marked "Exhibit 10" and ask you if that is a copy of the resolutions adopted at that time?

A. It is.

Mr. CLARK. I offer that in evidence.

Examiner McKEAG. Paper will be received.

(The paper was thereupon received in evidence, marked "Commission's Exhibit 10," and is forwarded herewith.)

Mr. MOLLOY. I would like to put an objection to these exhibits. I object to the introduction of these exhibits, being the report of the meeting of December 12, 1919, and also of November 18, 1920, because they express an opinion of a condition existing to-day, or at a date subsequent to the beginning of this proceeding.

Examiner McKEAG. The exhibits are received in evidence subject to Mr. Molloy's objection.

Q. Has Iselin & Co. been importers of all wool underwear at any time?

A. Yes.

Q. How recently?

A. Just before the war.

712 Q. Are you acquainted with that time of its business, as to its volume?

A. Yes.

Q. Will you state that such importations were?

A. It is comparatively the same, because it was started in the year when the war broke out abroad, and in August shipments were stopped. It was from England, the firm of More, Eady & Murcatt-Goode, of Lester, England. The orders which had not been shipped were canceled after the outbreak of the war abroad, and the business has not been resumed.

Q. That was the first importations of the kind which Iselin & Co., to your knowledge, had made?

A. Yes.

Mr. CLARK. I think that is all.

Cross-examination by Mr. MOLLOY:

Q. Mr. Cromwell, do you recall a meeting of the association held at Albany on October 28?

A. I do; in 1919.

Q. 1919?

A. Yes.



713 Q. And the question of labeling and printing were considered at that meeting of your association?

A. It was.

Q. I show you what purports to be a copy of the resolution adopted at that meeting and ask you whether that is a true copy of the resolution so adopted?

Mr. CLARK. Will you let me see it?

Mr. MOLLOY. Surely.

Mr. CLARK. I object to this on the ground—

Examiner McKEAG. He has not offered it yet.

Mr. CLARK. I object to his answering the question as to whether it was a true copy.

Examiner McKEAG. There is no harm in identifying the paper. The harm comes, if at all, when he offers the paper.

Mr. CLARK. Read the question.

(Question read as above recorded.)

Mr. CLARK. Does your question relate solely to the resolution?

Mr. MOLLOY. Yes; that is all.

Mr. CLARK. Well, if your question is confined to that I will withdraw my objection.

714 The WITNESS. Seeing it published in this copy of the Underwear and Hosiery Review, and in reading it, it agrees with my recollection of the resolution which was adopted at that meeting.

Mr. MOLLOY. I offer it in evidence.

Mr. CLARK. I don't object to the resolution itself being offered in evidence, but I object to its being accompanied with the whole paper.

Mr. MOLLOY. I am going to cut the resolution out.

Examiner McKEAG. It is agreed that this resolution may be copied from this leaflet by the stenographer and made a part of the record, and is as follows:

DEFENDANT'S EXHIBIT NO. 1.

"On October 28, at the Hotel Ten Eyck, in Albany, representatives of practically every woolen underwear manufacturer met under the auspices of the Knit Good Manufacturers of America. A resolution was adopted as follows:

"*Resolved*, That it is the sense of this conference that the general practice followed by each of the manufacturers in labeling and branding underwear manufactured by them as merino cashmere, worsted, and wool underwear when in fact such under wear is not composed wholly of wool, but is composed in part of wool, varying in the percentage thereof to meet the varying demands of the trade solicited and served by them, is not done with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear, and that such brands and labels are not false and are not misleading and not calculated and not designed to, and do not, deceive the trade and general public into the belief that such underwear is manufactured and made and

composed wholly of wool and which fact is universally known and understood by the manufacturers, jobbers, retailers, and consumers of underwear throughout the United States and elsewhere; and

"*Further resolved*, That it is the sense of each and every manufacturer present at this conference that the welfare of the underwear industry makes it necessary and advisable to answer and defend the proceedings brought against them, respectively, by the Federal Trade Commission, to the end that the charge that they and each of them have been and are practicing any unfair methods of competition or deception to the public be effaced from the records."

Mr. CLARK. Identify it as the resolution of October 28.

Examiner McKEAG. The resolution will show itself. The date is on there.

By Mr. MOLLOY:

Q. The resolution that has just been read into the record,  
716 Mr. Cromwell, was at the meeting when this subject was first considered by the association?

A. It was.

Q. And at which meeting a committee was appointed which subsequently reported at the November meeting, and adopted the report of the committee of which you were a chairman?

A. That is true.

Q. The November, 1920, meeting, Mr. Cromwell, was that a general meeting or a meeting specially called by the association?

A. It was a regular semiannual convention of the association.

Q. Mr. Cromwell, what would you say was the percentage in volume of garments of all-wool underwear as compared to part-wool made and distributed in this country?

A. I should think that it was a very small—

Mr. CLARK. I object to his answer unless he has qualified as to his knowledge of the subject.

Mr. MOLLOY. I withdraw the question.

Q. Mr. Cromwell, you have been a member of Iselin & Co. for how many years?

A. For 31 years.

Q. And your firm is largely identified with the underwear business in the United States?

A. Yes.

717 Q. Is it not a fact that your particular activities in the firm have been devoted to the underwear branch of your company's business?

A. Exclusively so until about six years ago.

Q. During the war did you occupy any position in aid of the Government's prosecution of the war?

A. Yes; I was in charge of all of the buying of underwear and wools, and over practically all the knitting and milling for the War Department, and officially in charge of it, and practically in charge of it for both the Navy and the Marine Corps, because they accepted my recommendation without question.

Q. You were practically a part of the War Industries Board?

A. No; that was separate, that was concerned chiefly with the civilian end, but they accepted my recommendation, so that I had practical control of the entire industry.

Q. And in that capacity you had, and before that time and during that time, you had occasion to make some study of the extent to which all-wool underwear was manufactured and distributed in this country?

A. Yes.

Q. Can you state what the percentage of all-wool garments  
718 is compared to all of the garments made of wool and part cotton?

A. It is very small.

Q. Do you mean value or volume?

A. I am speaking in number of garments. It is very small.

Q. What would you say would be the percentage?

A. I can not say.

Q. Would you say it was as much as 5 per cent?

A. Less than 5 per cent.

Q. It is practically negligible?

A. Yes.

Q. What is the tendency toward the public generally in its use or demand for all-wool garments to-day as compared to years past?

A. For men's and women's underwear the tendency has steadily drifted away from all wool. But for infant's wear I think it is sold as largely as ever.

Q. Is it not a fact, Mr. Cromwell, that the all-wool garment has invariably been marked and labeled as all wool?

A. I think so.

Q. In your capacity as representative of the Government during the war, you had occasion to be familiar with the general  
719 specifications and form of orders for wool and woolen underwear?

A. Yes.

Q. Is it not a fact that in calling for offers of underwear which, in fact, contained but a part wool and part cotton, and, in fact, which was specified to contain part wool and part cotton, were called for to the trade under the heading of wool underwear?

A. Where they were drawn under my instructions it was called wool and cotton underwear.

Q. Do you know whether that phraseology is continued to-day?

A. I think so. The specifications which we drew during the war are still the official specifications.

Q. Are you acquainted with the Winsted Hosiery Co.?

A. By reputation I am well acquainted.

Q. Will you state, for the purpose of the record, Mr. Cromwell, what your opinion is gathered from your experience in the trade of the Winsted Hosiery Co., in its integrity of merchandise and general standing?

A. It stands at the very top.

Q. Do you know whether there is known in the market to-day as merino wool a distinct product of merino sheep; that is, commercially?

A. Yes; there is.

Q. What would you say in the meaning of the word "merino" as you understand it?

A. That can't be answered in a single sentence, even. It has several meanings. It has, of course, the meaning of merino wool, meaning the wool from the merino sheep, of which there are a large number in this country, and it is a distinct type of wool which every tailor knows. There is a trade term "merino worsted," which means combined yarn, composed partly of wool and partly of cotton. That is a perfectly well-known trade name between spinners of the yarn and people who buy the yarn. To the public there is a word "merino" which, I think in this part of the country among tailors, implies a fabric composed partly of cotton and partly of wool. What the general public understands by it I am unable to tell.

Q. I ask you, from your experience of 30 years and more in this industry, Mr. Cromwell, whether it is not a fact that for the past 20 years it has been the general custom and practice in the underwear business to label and brand underwear as natural merino, wool, natural wool, natural worsted, and Australian wool, when, in fact, such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool, and are branded and labeled by them as such?

A. That is correct.

Q. Is there any garment known commercially in the trade, Mr. Cromwell, as merino hosiery or hose made entirely of wool taken from merino sheep?

A. I am not able to answer that.

Mr. MOLLOY. That is all, Mr. Cromwell.

Redirect examination by Mr. CLARK:

Q. Let me ask, how does the amount of wool underwear imported compare with the amount of wool underwear of domestic manufacture. Is it greater or less?

A. I don't know.

Q. Are you able to state approximately the amount of importations of all-wool underwear for any recent year?

A. No; but the importation of underwear is a very small matter.

It is mostly in the English stock, of very high grade, sold under the manufacturer's label of E. & I. M. It is sold usually only by the highest-class haberdashers or dry goods retailers. It is something that has no so-called popular sale at all. The price is very high and the purchasers of it must be limited to those with a long purse.

Q. Can you make a statement of comparison between all-wool garments either manufactured here or imported, compared to other underwear of mixed cotton and wool, in respect to the comparative value?

A. Well, all wool is very much more expensive.

Q. Well, five times as expensive, or can you make a general statement?

A. No; you can not, because all wool is imported, and made also in this country in imitation of the foreign stuff, such as Jaeger, which is made in Philadelphia, is very high grade; whereas, the underwear made partly of cotton and partly of wool is in every grade from very low grades to very high grades.

By Examiner McKEAG:

Q. Figuring on values, the percentages of all wool as compared to mixed cotton and wool is larger then?

A. Yes; but it is still very small. All wool is required for  
723 infant's underwear—

Mr. CLARK. I object to that.

The WITNESS. I did not finish the sentence.

Mr. MOLLOY. Let the answer stand. I think it should stand.

The WITNESS. I mean a great many mothers will not put on their infants anything but all-wool underwear, but there is a great deal of infant's underwear solely of cotton.

By Mr. CLARK:

Q. Did you import infants' underwear just before the war?

A. No; entirely men's.

Q. Are you familiar, Mr. Cromwell, with the statistics of the census of 1914 regarding the manufacture of knit goods in this country?

A. I have a copy of them which I have, but I have none of the figures in my mind.

Q. Well, if it appeared from the reports of the census of manufacturers for the year 1914 that the proportion of shirts and drawers of domestic manufacture for the year 1914 was in dozens 373,045, while the amount of such production of Merino shirts and drawers for the same year was stated to be 1,434,504, and that the value, respectively, of the wool shirts and drawers and the Merino shirts  
and drawers were approximately one to three, would you  
724 modify your statement as to the percentage of the wool manufactured compared to Merino?

A. I don't think I would.

Q. You have no special knowledge, I suppose, of the methods of compiling and classifying such goods by the Census Bureau?

A. I have been consulted by the Census Bureau as to how they could improve their methods, and it was shown that their methods were very slipshod and inaccurate in the way in which they compiled their census, and they decided to make, and did make, quite radical changes as to taking the census of 1920.

Q. Be more specific as to what the changes were.

A. They submitted one of their blanks to us, and we all agreed that the classifications were indefinite and inaccurate.

Q. A little more particular?

A. Well, I am perfectly certain that a statement which shows figures you have cited is absolutely wrong. The Root Manufacturing Co. makes about 175,000 dozens a year.

Q. All mixed?

A. Yes; all mixed, and no all wool. I think that their business averages as high grade as any mill in the country.

Q. But you know that some manufacturers make their product principally all wool?

A. No; I do not. I do not agree to that at all.

725 Mr. CLARK. I think that is all.

Recross-examination by Mr. MOLLOY:

Q. I just want to add one more question, Mr. Cromwell. Is it not a fact that large quantities of underwear and similar wearing apparel have been imported into the United States from foreign countries, and that it comes in direct competition with the underwear manufactured throughout the United States. That the underwear so manufactured in the United States has been and now is labeled, branded, and advertised as wool, merino, and worsted underwear, in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but on the contrary is composed partly of wool and partly of cotton in varying percentages?

A. I am not able to state.

Mr. MOLLOY. That is all.

HARVEY O. LLOYD was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. Give the stenographer your full name, please.

A. Harvey O. Lloyd.

726 By Mr. CLARK:

Q. What is your business, Mr. Lloyd, at present?

A. Manager of the foreign department of Julius Kayser & Co., at the present.

Q. Have you had any official employment in the past in connection with the customs department?

A. Yes, sir.

Q. Please state what it was.

A. Examiner in the United States appraiser's office; examiner of merchandise.

Q. Any particular class?

A. Specially of knit goods.

Q. Did your duties give you information as to the amount of imports of all-wool underwear?

A. We kept no statistics in the appraiser's office as to quantity or value in some years. These figures, I believe, are obtained and tabulated by the Department of Commerce at the customhouse.

A. Did they distinguish as to all wool and garments partly wool?

A. I don't think they did.

Q. Well, are you able to make any statement from your observation and your employment?

A. In a general way.

727 Q. Well, to the best of your knowledge, state the volume of importations of all-wool underwear during the last 5 years or 10 years, being specific as to the time and amount as you can be.

Mr. MOLLOY. I object to the witness answering that question. No foundation has been laid for his answer to it. The qualification shows that he has been in charge of the general appraiser's office here. There are other points of importation through the United States where importations come in and are classified.

Examiner McKEAG. He may answer subject to the objection. Read the question.

(The question read as above recorded.)

A. Since the beginning of the war, while I can not state any exact figures, the importation fell off largely. It was confined mostly to Swiss goods and to the better grades of English goods only. Prior to the war we had large importations from Germany of branded goods, by which I mean goods that were sold under a name. The same thing, practically, applied to English goods, though the importations were not so large.

Q. Can you state approximately the amount?

A. I am sorry to say I can't. I would not hazard a guess.

728 At one time we had figures on that. It is out of my mind now.

Q. Can you refresh your memory? Have you material from which you could refresh your memory?

A. Well, as I say, in the appraiser's office those statistics had not been kept for seven years, and the statistics which I had in mind were those obtained from the Department of Commerce from time to time, given in reports used for tariff boards. The Tariff Commission at the present time is compiling those figures.

Q. Well, are those figures available to you now anywhere?

A. Well, as a private citizen they would be, as much to me as to anybody, at the Department of Commerce.

Q. Do they distinguish as to the all wool?

A. No; they do not.

Q. Well, would you say that the value of the importations annually amounted to a hundred thousand dozens of underwear?

Examiner McKEAG. Of all wool, you mean?

Mr. CLARK. Yes.

A. No; I don't think it would.

Q. Fifty thousand dozens?



A. Well, that is a difficult question to answer, for the reason that the figures were not obtained separating the all wool from the wool and cotton, there being no occasion for it.

Q. Can you state any more definitely than you have?

A. No.

Q. In your official duties you have passed through your hands the declarations of all-wool underwear, have you not?

A. Yes, sir.

Q. I wish you could state numerically what you would think is a safe statement of the importations.

A. I would like to, but I am not able to, because my memory is not clear. However, in round figures, my impression was that the year of the largest importations ran around, I think, a hundred thousand dozens.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLOY:

Q. And the hundred thousand dozen was all wool and part wool and part cotton?

A. Yes.

Q. And when you say hundred thousand dozens you don't want to say that it was a hundred thousand dozens of all wool?

A. No, sir.

Q. In what capacity were you employed in the general appraiser's office?

A. As an examiner, my duties being to appraise and classify.

Q. And in that capacity what was the term usually used or known to indicate an underwear garment composed partly of wool and partly of cotton?

A. There were two kinds. One was known as merino and another as wool and cotton.

Q. The word merino had been generally understood during the time you had been in the appraiser's office as meaning a garment composed partly of wool and partly of cotton?

Mr. CLARK. I object to that unless he states by whom.

Mr. MOLLOY. By whom? I said by whom. Strike out the question, Mr. Reporter.

Q. During your employment in the appraiser's office is it not a fact—how long were you employed in the office?

A. Twenty-five years.

Q. And during the 25 years of your employment in the appraiser's office, is it not a fact, Mr. Lloyd, that an underwear garment composed partly of wool and partly of cotton has been known as merino underwear?

A. The term merino was applied almost strictly to goods of English manufacture where the wool and cotton was combed in the yarn, and there was woollen underwear where it was made thread and thread, one thread of wool and two of cotton, or vice versa, which was termed wool and cotton.



Q. But it is a fact that the garments imported that did contain part wool and part cotton was known during your experience as merino?

A. As I say, when the two substances were combined in the one yarn of which the garment was made.

Q. So that the fabric was a fabric made of wool and cotton and was known as a merino garment?

Mr. CLARK. The witness has answered very specifically.

Examiner McKEAG. He may answer more specifically.

A. As I said before, the term merino had a specific meaning to my mind, merino being underwear made of yarn, the yarn itself being composed of wool and cotton. Garments coming in composed of yarn of wool and yarn of cotton were usually termed wool and cotton.

Q. Do you know what a plated garment is? Is it not a garment made where the yarns are separate?

A. A plated garment is applied mostly to hosiery where the wool was thrown to the surface in the knitting and the cotton thrown to the back. There were two yarns.

732 Q. And these were called wool and cotton as distinguished from the garments that were made of a yarn which consisted of a mixed yarn?

A. Yes.

Q. And that was known as merino?

A. Yes; I might be more specific there. Merino importations were confined almost strictly to those from England. Wool and cotton, some few shipments came that were from England in the men's goods. I think the term merino was used on importations of women's goods from Switzerland, where wool and cotton were separated in the yarn, the term merino was applied there.

Q. Mr. Lloyd, are you familiar with the way the merchandise was marked and labeled?

A. In a general way, yes.

Q. And in the garments that came under your observation that were all wool, is it not a fact that the label or brand indicated that they were all-wool garments?

A. Very few if any of the merchandise itself was marked. The mark would be on the carton, or occasionally on the tag. The terms we used were cotton, merino, and wool and cotton on the carton.

Q. On the card?

733 A. On the cartons, the labels on the boxes.

Q. And where they contained an all-wool fabric, they were so marked all wool?

A. They were marked all wool.

Q. All wool?

A. Well, I won't be sure on that point.

Q. They were not marked merino, were they?

A. When they were merino, yes.

Q. I mean, when they contained all wool they were not marked merino?

A. No.

Mr. MOLLOY. That is all.

Redirect-examination by Mr. CLARK:

Q. You dealt in your official duties with importations by importers in the underwear trade?

A. Yes, sir.

Q. And these terms which you have stated as used as a classification of the goods by you in your official duties were trade terms, were they not?

A. Yes, sir.

Q. Adopted for the purpose of appraising the goods as  
734 classified by the importers?

A. Oh, no. The trade classification had nothing to do with the classification for the purpose of duty. They were separate and distinct.

Q. Well, do you know how the classification for appraisal was adopted?

A. Why, yes; the classifications for appraisement were made according to the phraseology of the tariff act.

Q. Do you know that the tariff act, Schedule K, describes merino as applied to garments to be?

A. There was no specific provision for anything but wool.

Q. That is a matter of legislation, and you can't say as to the method by which these terms used in the tariff act were adopted?

A. No. Up to the tariff act of 1913 tariff was for wool or any part wool, so that it required no other classification other than wool wearing apparel.

Q. All wool and partly wool came under one classification for the purpose of duties?

A. Yes.

Recross-examination by Mr. MOLLOY:

Q. In your experience was the classification ever separated  
735 as calling for all wool, and also another classification calling for part wool?

A. In the tariff act of 1913, which is the present one, for the first time in years there was a provision made for whole or any chief value of wool, requiring an analysis to be made of every garment which was composed of wool and cotton.

Q. And if the garment under that act came in where the item of chief value was other than wool, it would take another classification?

A. Yes.

Q. And if a garment marked merino came in where the value of materials was other than wool in the garment, that would be taxed under the schedule calling for other than wool as chief value?

A. Yes.

Q. And after that the word merino was used on the cartons or labels or other method of describing the contents of the article as merino would not put it under the classification of all-wool garment?

A. No, sir.

Mr. MOLLOY. That is all.

Re-redirect examination by Mr. CLARK:

736 Q. That is, the term merino would have no bearing on its classification one way or the other?

A. Absolutely not.

Mr. CLARK. That is all.

(Whereupon, at 12.06 p. m., the hearings in the above matter were adjourned subject to reasonable notice.)

737 Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION	} Docket No. 214.
vs.	
WINSTED HOSIERY COMPANY.	

740 NEW YORK, N. Y., *December 16, 1920—10 o'clock a. m.*

Met pursuant to adjournment.

Present: Parties as before.

W. B. KNEASS BROOKS was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Where do you live, Mr. Brooks?

A. I reside twelve miles out of Boston.

Q. What is your business?

A. Manufacture and sale of wool and worsted yarns.

741 Q. Are you connected with any organization of that trade?

A. I am president of the National Association of Worsted and Woolen Spinners.

Q. What trades, speaking generally, or branches of the clothing industry do you supply as a manufacturer?

A. On worsted and woolen yarns we supply practically all of the clothing industry, and we supply all concerns who manufacture either cloth or garments.

Q. And what kind of yarn? Do you supply various branches of the business?

A. We supply all kinds of worsted and woolen yards.

Q. There are two great classes—worsted and woolen?

A. Yes, sir.

Q. Will you describe briefly those yarns so as to distinguish them in their manufacture?

A. The worsted yarn is made from the long fibers of the wool; the wool in making worsted is first combed on a worsted comb. This comb separates the long fibers from the short fibers. The long fiber is known commercially as the top. The short fiber is commercially known as a noil. Worsted yarns are made from the top, and a worsted yarn, strictly speaking, can be nothing but virgin wool.

Woolen yarns are carded and rubbed together, not being combed at all.

Q. You mean the fiber of the wool is rubbed together?

742 A. The fiber of the wool is rubbed together and the twist of the yarn is put in only in the last operation, not on a mule.

Worsted yarn—twist is put in every operation up to the final operation of spinning. But in woolen yarn the twist is only put in on the last operation. That also applies to French spun worsted. While it is made out of combed wool using only the longer fibers there is no twist put in until the very last operation, but the intrinsic difference is that worsted yarns are made from long fibre after the wool is combed; woolen yarns are made out of shorter wools that come under the noil or short fiber from the comb. They can also use shoddy and cotton.

Q. You sell to the knit-goods manufacturers, do you?

A. We sell some yarns to the knit-goods manufacturers.

Q. And where do you buy your raw materials; that is, wool principally?

A. We buy from the wool combers. We buy top from the wool combers. We don't buy raw wool.

Q. Do you buy noils, too?

A. Some of the woolen mills, the wool spinners buy noils, but I understand the woolen yarns are not under discussion.

MR. CLARK. Oh, yes, they are.

743 A. They are? Well, we have a woolen mill which also buy noils.

Q. For the purpose of making yarns for the knit-goods trade which of the two do you purchase to work into yarns, noils or tops?

A. The knit-goods trade uses both systems, both the woolen system and the worsted system.

Q. Where they manufacture underwear, for instance, manufacture a garment made of cotton and woolen, in some such percentage as half and half, can you state what the composition of the yarns which he purchases for that purpose is in respect of the wool in the yarns being long or short fiber?

A. That depends on whether you are referring to a woolen undergarment or a worsted undergarment.

Q. I am referring to a wool one.

A. As a general rule, an underwear made of woolen yarn would be short fiber.

Q. What are the terms of your business in the market where you buy your tops and noils as to the grade of wool?

A. Trade custom here designates a fine wool as fine, a half-blood wool as half-blood, a three-eighths as three-eighths, a quarter-blood as quarter-blood. The same applies to noils—fine, half-blood, three-eighths or quarter.

Q. Fine being in both cases the superior of the different classes?

744 A. Yes, sir.

Q. Now, you used the term half-blood, quarter-blood, and so forth; to what blood does that refer?

A. It refers to the merino blood in the sheep.

Q. What do you personally understand the term merino to mean?

A. The term merino, properly speaking, is used to apply to the full-blooded merino sheep, which grows the finest wool grown in the world.

Examiner McKEAG. What you mean by the fine wool is the merino wool. You designate fine tops and fine noils, you mean that is full-blooded merino?

The WITNESS. As a general rule, yes.

By Mr. CLARK:

Q. So that the merino stock is the basis of the wool-growing industry in this country to-day?

Mr. FRANCE. I object to that, it is a leading question and may—

Mr. CLARK. I withdraw that and frame it another way.

By Mr. CLARK:

Q. You are familiar with the wool market and the terms used there as to the quality or grades of wool?

A. I am.

745 Q. And what are, again, the principal, the general terms to distinguish as to quality used?

A. Just the same as I stated before: Fine wool, half-blood, three-eighths, quarter-blood.

Q. Have you any knowledge as to the existence to-day of flocks of sheep known as the merino sheep in this country?

A. No personal knowledge; only by hearsay.

Q. You have stated that you sell to knit-goods manufacturers?

A. Yes, sir.

Q. And are you—I suppose you personally have had occasion to purchase underwear of knit goods?

A. I have not. I wear B. V. D.'s, light weight, the year round.

Q. How about your family, do they wear some knit goods?

A. They have in the past. At the present time they are wearing cotton or silk.

Q. Can you relate any experience as to the quality of underwear sold under various labels, which have been brought to your attention as to the question of composition in wool and cotton?

A. I can. In past years when they were wearing underwear made out of wosted, the women folks of my family have brought home garments requesting my opinion as to their composition. I can

746 not recall exactly the way those garments were labeled—I know that in some cases they were misleading.

Mr. FRANCE. I object to that and ask that it be stricken out, unless you have the data on which you base your opinion.

Examiner McKEAG. It will be necessary to explain what the labels were and wherein they were misleading.

The WITNESS. I can not say specifically. It is hazy in my own mind excepting that some such terms as natural wool, pure wool, merino—I can not give the exact wording of these labels.

Mr. CLARK. But your examination satisfied you of what, as to the actual composition of those garments?

A. That some garments so labeled distinctly were mixtures of cotton. I would like to qualify that by saying that in some instances my wife, my mother, or sister would come and ask me, "Is there any cotton in this garment"? My judgment would be that sometimes there was cotton in the garment. I also found out that in some retail stores they would state frankly "This garment contains fifty per cent cotton." They got acquainted with the fact that cotton was used in undergarments.

Mr. FRANCE. I object to this testimony and ask that it be  
747 stricken out if it refers to what the witnesses's relatives, wife or others, experienced in the trade, as being not proper evidence in this proceeding.

Examiner McKEAG. He may answer subject to Mr. France's objection.

A. In some instances the sales person would state positively to my family that "This garment contains fifty per cent of cotton"; they are more likely to say it is half cotton. As I started to say, this gave them knowledge of the fact that cotton was used in underwear, and they made it a practice in buying such underwear to ask whether it contains any cotton or not. Sometimes the answer would be very frank and some times the sales person would say "I don't know." I explained to them carefully—

Mr. FRANCE. I want to make the same objection and ask that this be stricken out.

Examiner McKEAG. The motion will be reserved.

The WITNESS. I explained to them carefully that underwear containing a percentage of cotton, if it was not over one-half cotton, was really a better garment than if it was made of all wool or all worsted. That was my opinion.

Mr. CLARK. Can you state generally how the price of fine  
747 wool, which I understand to be the best quality of merino wool, compares with the half-blood or quarter-blood?

A. It would be impossible to give any definite figures as to the difference in price. The fine wool, as a rule, is of course higher in price than half-blood.

Q. What other qualities of wool besides the fine, half-blood, and quarter-blood are there? They all relate, as I understand, to the proportion of merino blood.

A. There are other qualities; for instance, the very lowest wool or carpet wool.

Q. Is carpet?

A. Is suitable for nothing but carpet.

Q. And does that wool compare in its actual character with the blood wool?

A. It is much coarser in fibre.

Q. From what sheep do the carpet wools come?

A. I don't mean there is any special name for them.

Q. Are there certain parts of the pelt of the sheep which are coarser in their fibres than others; is that what you mean?

A. Yes, sir.

Q. Is there a class of wool that is distinguished as not having any of the merino blood, aside from carpet wools? Is there a term  
749 "grades" which indicates a general class of inferior wools?

A. Grades?

Q. Yes; I am just asking for information.

A. I am not a wool man.

Q. No?

A. I don't deal in those very low wools; I don't know of my own knowledge whether there is a term "grades" applied to the lower classes.

Mr. CLARK. That is all, Mr. Brooks.

Cross-examination by Mr. FRANCE:

Q. How long have you been a spinner? Connected with this industry of spinning?

A. Since 1889.

Q. What is a worsted merino yarn?

A. A worsted merino yarn is a yarn composed partly of worsted yarn made of combed wool and cotton fibres made from combed cotton.

Q. Is it a term that has been used in the industry as long as you can remember?

A. Merino has been used in the industry for over thirty-three years to my positive knowledge.

750 Q. I mean the term worsted merino yarn has been used as long as you have had anything to do with it?

A. It has.

Q. Probably before?

A. Probably before.

Q. So that a garment marked worsted merino is a garment that is fully in accord with definitions and terms used in your industry for many years?

A. It is.

Q. Unquestionably?

A. Yes.

Q. So the use of the term merino in that way—that is, in complete accord with everything that you know about the industry in which you are engaged?

A. No; it is not everything I know. In my industry, in the spinning industry, a man comes to mean by worsted merino yarn—a man comes to buy worsted merino yarn and he will say, "What per-



centage" ? and his order is taken with a different percentage of worsted wool and cotton and it is so conformed and so billed.

Q. I want to see if it is not exactly the fact that the term worsted merino yarn has been used for generations to define a  
751 yarn made of cotton and wool in varying percentages?

A. Unquestionably to my personal knowledge for 33 years.

Q. So that a garment sold under that term—you would not say was sold under misleading label, would you?

A. Not to me or to anyone who is conversant with the word "merino" as used in the trade. To the general public it might be.

Q. Now, on this subject of blood. Isn't it a fact that in your industry that term "merino" as applied to wool is used with reference to a standard meaning, a wool of full blood?

A. It is.

Q. A wool which you might define as of a half blood does not mean that that specific wool is half-blood merino, does it? Doesn't it mean that it is a standard which is one-half of the full merino, which you would set up as a standard—maybe you don't get my question.

Examiner McKEAG. You mean by half blood—that half-blood grade is equivalent to the usual wool from a half-blood merino sheep. Is that what you have in mind?

Mr. FRANCE. No; leave that go for a minute. The term  
"merino" as you [addressing the witness] used it in your  
752 industry is a term of grading, isn't it, of wool?

A. Yes; full-blood merino means very fine wool.

Q. So that anything that you would define as very fine wool would be merino. They are interchangeable terms?

A. They are, in the trade; yes.

Mr. FRANCE. I think that is all.

May I ask one further question?

Examiner McKEAG. Surely.

By Mr. FRANCE:

Q. You have had some experience directly with the knit goods manufacturing business? That is, the manufacturing of knit underwear?

A. Only in so far as selling them yarns.

By Mr. CLARK:

Q. Do you make any all-wool or all-worsted yarns?

A. Surely.

Q. And you supply such yarns to knit goods manufacturers?

A. Yes.

Q. In mixed cotton and wool underwear, for instance, in the knit goods industry, I understand a garment which is made of yarn  
753 in which there is wool and cotton—is that your understanding—that the mixture, in other words, is in the yarn?

A. The garments are made both ways.

Q. What is the other way in which the mixture would appear?



A. The other way is to use a woolen yarn and a cotton yarn, and knit them together. In other words, the wool and the cotton may be blended in the yarn or they may take the two yarns in the different systems and blend them in the garment.

Q. Do you know which is the commoner practice?

A. I do not.

Q. You sell directly to knit goods manufacturers, do you not?

A. Yes, sir.

Q. And you have some knowledge of their product in respect to its composition either being all wool or wool and cotton?

A. How do you mean I have knowledge?

Q. Do you know what their output is in that respect?

A. Sometimes.

Q. Do you know that there are manufacturers of all-wool underwear?

A. Do you mean that some manufacturers manufacture all wool and nothing else?

Q. I mean, do you know that there is some all-wool underwear made?

754 A. Surely.

Q. Can you name some of the firms or companies that make some all-wool underwear, to your knowledge?

A. I should think almost any manufacturer of underwear would put out some lines in all wool.

Q. Will you please name any of those you happen to know who do?

A. That is impossible for me to say because while I sell them an all-wool yarn they may use cotton with it in making the garment. I can not tell that from my own knowledge.

Q. But from your knowledge, as a rule, some undergarments are made of all wool?

A. Most of them have side lines of all wool.

Mr. FRANCE. I object to that.

Examiner McKEAG. Let him answer, if he knows.

A. I can not say that positively; I believe they do; but I can't say it positively.

Q. Have you an opinion as to the origin of the trade term "Worsted merino yarn"?

A. I have not. I know it always has been used, but I can give you no idea as to its origin.

Q. You have stated that in wool markets these tops and noils  
755 that you purchase are known by descriptions relating to the standard of the merino blood. The term worsted merino, as applied to a yarn which consists partly of cotton, has not the same appropriateness as it—

Mr. FRANCE. I object to that. It is immaterial, incompetent, and irrelevant and not a proper question—

Examiner McKEAG. He may answer subject to objection.

(The question was then read as above recorded.)

A. I should say it has; cotton is a fine fibre and it is impossible to blend it properly in a worsted merino yarn with anything but a fine fibre. It could not be blended with a low stock.

Q. In the wool market merino means wool, doesn't it?

A. It means a grade of wool.

Q. Yes; and a fine grade of wool.

A. Yes.

Q. It doesn't mean cotton?

A. No.

Q. And yet as applied to the mixed cotton and wool yarns it is applied to something which includes cotton as well as wool?

756 Mr. FRANCE. I want to object to this as an argument with the witness after he has made his answer to the question of counsel and that I think the question as now put is incompetent, irrelevant, and immaterial.

Examiner McKEAG. You may answer subject to objection.

Mr. CLARK. You seem not to understand that I have in mind worsted merino certainly means a mixture of wool and cotton. How can the term merino be properly applied to cotton?

Mr. FRANCE. I object as being immaterial, incompetent, and irrelevant and to how it can be properly applied.

Examiner McKEAG. He may answer subject to objection.

A. I have already testified that to my certain knowledge of over thirty-three years the term merino also means a yarn composed of wool and cotton.

Q. What I am getting at is this, whether the use of the term merino in connection with the yarn made partly of cotton is not inconsistent with the practice of the wool market of characterizing as merino pure wool?

A. It may be inconsistent with the practice of the wool market, but it is not inconsistent with the practice of the yarn market.

Q. Of the yarn trade?

A. Yes, sir.

757 Examiner McKEAG. Have you had any trouble in the trade over the use of the term merino yarn?

The WITNESS. None whatever; it is generally understood.

Mr. CLARK. That is all, Mr. Brooks.

The WITNESS. May I venture an opinion, whether relative or not?

Examiner McKEAG. Yes.

The WITNESS. In my opinion, the entire matter as it stands to-day is up to or depends upon the honesty of the retailer in the sale of the garment over the counter. I also believe that if a garment is labeled worsted merino that it would be much better for the consuming public, for the trade in general, if the garment was labeled fifty-fifty worsted merino or sixty-forty worsted merino, as the case may be.

Mr. CLARK. Since you volunteered this opinion wouldn't you indicate what those percentages were of?

The WITNESS. Yes; wool and cotton. In the trade wool is always mentioned first so that seventy-thirty merino yarn would indicate seventy per cent wool, thirty per cent of cotton.

By Mr. CLARK:

Q. Would it to the public, unless the word cotton was added, as well as wool?

758 A. I believe the underwear manufacturers should start a campaign in their advertising to educate the public and to tell them at the same time that the mixture of cotton unquestionably improves the garment from every standpoint.

Mr. FRANCE. I object to this as incompetent, irrelevant and immaterial and should be stricken out.

Examiner McKEAG. That may stand subject to objection. Carrying that same thought further would the same apply to yarns as well as knit underwear?

The WITNESS. It is done in the labeling and billing of their yarns. They are sold and billed as eighty-twenty, seventy-thirty and so forth.

Examiner McKEAG. Would it not be possible for a dishonest yarn manufacturer to pass off a low percentage of merino cotton yarn as a high percentage of cotton merino?

The WITNESS. Possible, but not probable; he will be caught at it immediately.

Mr. CLARK. Then worsted merino yarns are, as a fact, when they are sold by the yarn manufacturer labeled or ticketed as to a percentage of cotton to the purchaser?

The WITNESS. I wouldn't say labeled or ticketed; they are sold and billed to indicate the percentage of cotton in the yarn.

Mr. CLARK. That is all.

759 By Mr. FRANCE:

Q. On that opinion of yours, just one minute. To define a garment as cotton and wool means very little to the public, unless you define the percentage, isn't that so?

A. I should say so.

Q. The same element of possible deception and fraud upon the public, if any, would arise from simply marking a garment cotton and wool as it would worsted merino?

A. That is so.

By Mr. CLARK:

Q. Wouldn't it at least, assuming that some of the public take the term merino to mean all wool, put such consumers on notice that there was cotton in the garment?

A. Surely.

Q. In your opinion, from your observation, are there not members of the public who understand all wool by these terms merino, all wool, natural wool.

Examiner McKEAG. As applied to the finished article?

Mr. CLARK. Yes.

The WITNESS. Some individuals among the public unquestionably would understand that.

By Mr. CLARK:

760 Q. So as to them the addition of the term cotton would disclose what they don't know—that there is cotton in the garment?

A. Surely.

Mr. CLARK. That is all.

By Mr. FRANCE:

Q. This is all based on the assumption, of course, that there are some that don't know?

A. Yes.

Q. Where do you think they ought to get their knowledge of what the terms mean? The commonest source is the dictionary, isn't it?

A. The commonest source; yes.

(Witness excused.)

WALTER D. LARZELERE was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Larzelere?

A. Manufacturing and selling of worsted yarn.

Q. Where is your factory located?

761 A. Well, I am vice president of the Pitkin Worsted Company at Passaic, New Jersey, and also selling agent of that concern, and I am also selling agent of the Botany Worsted Mills, Passaic, New Jersey—the yarn department.

Q. Have you had any experience which makes you familiar with the manufacturing end of the yarn industry?

A. I have been in the business 28 years, but my work was outside of the mill most of that time.

Q. You are acquainted with the manufacture of yarns, are you not?

A. Yes.

Q. Do you buy wool?

A. Personally, no.

Q. Do you have anything to do with the purchase of materials with which the yarn is spun?

A. No.

Q. Do you know the composition of yarns?

A. I do.

Q. What yarns, in respect to their composition, do your mills produce?

A. All kinds of yarns except merino and carpet yarn. Of course, we don't make those.

762 Q. What is their composition in respect to their contents of wool and cotton—those you produce—on your woolen yarn?

A. I don't think that question can be answered.

Q. Do you make all-wool yarns?

A. We do not.

Q. Do you make all worsted yarn?

A. We do.

Q. Do you make any others?

A. We do.

Q. You sell to the knit-goods trade?

A. Yes.

Q. Can you name some of the customers that buy all-worsted yarns?

A. Practically all the trade.

Q. Do you know whether or not they make all-wool garments?

A. I have to qualify my answer, Mr. Clark.

Q. Please make it and qualify it.

A. When I sell a knitter a quantity of worsted yarn I don't ask him what he is going to do with it. He may put that into a straight worsted fabric, or he may put it in a so-called plaited fabric, composed of cotton. If he uses my yarn, which is straight  
763 worsted, a very large percentage of his mill will probably run on a cotton yarn along with my worsted yarn. He may make some straight worsted fabrics out of that; in fact, he does, but I would not like to speak of any particular customer, because I could not—I would have no way of knowing exactly except to suspect that it was just straight worsted fabric.

Q. You don't know any yarns which are known in the trade as worsted merino?

A. We don't make them. We run up against them all the time, but we don't make them ourselves.

Q. You say you run up against them. Do you find yourself in competition with them?

A. Always. Not always. I would qualify that. Most of the time.

Q. Suppose your all-worsted yarns were made into a garment in which there was no cotton. The product, of course, would be all wool?

A. All wool.

Q. In the case of a garment in which there was some, at least, of the merino worsted—merino yarn—the product would be mixed cotton and wool?

A. There wouldn't be merino yarn where they are using our worsted yarn, Mr. Clark.

764 Q. To go back a step. In making the worsted yarn, what kind of wool, as to its fineness, do you use?

A. That depends on the manufacturer of the yarn.

Q. I am speaking to you.

A. Our plant?

A. Yes, to get a practical instance.

A. It is very hard to answer that question, without explaining it, Mr. Clark.

Q. I want to get at this point: I understand that worsted yarns necessarily employ a long staple wool.

A. Not always. No.

Q. Can you state as to mixed cotton and wool yarns whether the long staple wool can be combined practically with the cotton?

A. The long staple wool with the cotton?

Q. Yes.

A. You understand that cotton, the combed fibre, is rarely over an inch and a quarter staple? Your staple rarely runs over an inch and a quarter—that is, a long staple combed.

Q. No, the wool staple.

A. The wool staple may be several inches. You don't grade your wool so much by your length of staple as the fineness of the  
765 fibre itself in circumference—not so much in length, although it is a fact that a lot of your breech wool would have a long staple. Breech wool is simply the very lowest wool and would not be used—doesn't enter into the proceeding at all; it is too low to use—it is the riffraff of the mill.

Q. Doesn't it relate to a part of the sheep?

A. What, Mr. Clark?

Q. The torn breech.

A. Yes.

Q. To the breech; to the rear; between the legs?

A. Yes.

Q. What sort of wool is used in worsted yarns as compared with wool yarns?

A. In worsted yarns we use the fine combing fleeces; in the wool yarns we use the shorter staple so-called clothing wools.

Q. How do you classify or grade your worsted yarn when you sell them?

A. Well, every mill has its own classifications.

Q. As relating to the raw material, if there is any way of referring to them.

A. No, there is no relation to the raw material in the classification of your qualities, worsted spinners selling their product on  
766 either numbers or letters, as a rule.

Q. Well, now, the fineness of the staple, on which you say the grading of wool, as I understand, depends, does at last relate to the fleece, does it not?

A. Yes.

Q. Well, then, isn't—doesn't the wool which is purchased for the purpose of manufacturing the worsted yarns classify itself as to the sheep from which it comes?

A. Not in the selling of yarn.

Q. And you can not speak for the purchasing of the wools with the view to qualifying the answer or rather explain it.

A. No; for example, your finest grade of Australian wool we would designate at our Botany mills as three-a quality. We would

not have to tell the buyer of that yarn what it was made out of, because he knows what it is made out of. It is Botany 3-a. That might be Smith's "A" quality or Brown's "1's." Do you get my meaning?

Q. Is there one touchstone to which any individual classification can be referred for the information of the whole trade?

A. What do you mean—a touchstone?

Q. You say 3-a Botany, if I understood you, might mean Smith's "A" or Brown's something else.

767 A. In other words, he may call his finest Australian yarn 1's; another might call C.

Q. When they buy of you they expect to get a particular quality of yarns?

A. Yes. If I mention 3-a he knows it is all Australian.

Q. Then you know that 3-a—this particular case—is made of Australian wool?

A. Yes.

Q. Now, what do you understand by Australian wool?

A. Well, that is a trade name. It is our finest wools in the world and they come from Australia.

Q. Do you know what sheep, as described other than by locality, that the business is?

A. Well, for example, we have several grades. You see, I can't answer these questions yes or no, because they are a little complicated. You speak of the word Australian wool; you get all grades of wool from Australia.

Q. Well, you use in making worsted yarns a fine grade of wool?

A. But it so happens we get the finest grade of wools from Australia—but we get all kinds, medium and fine wools from Australia, too.

768 Q. You are familiar with the fact that knit goods trade uses when they put out underwear made of cotton and wool the term merino and natural wool, gray wool?

A. Yes.

Q. And natural worsted?

A. Yes.

Q. And you so have stated that all wool garments are manufactured, made, you suppose, in some cases, of such yarns as you produce?

A. I would suppose so but I do not know.

Q. Well, have you had some observation of the selling of knit underwear—knit goods underwear?

A. That is not my business, Mr. Clark.

Q. Do you buy your own underwear?

A. Yes.

Q. Have you in the past or present purchased underwear containing more or less wool?

A. Well, I am like your previous witness; I am a B. V. D. man 12 months in the year.



Q. Have you had any observation of the use of these labels?

A. Yes; in regard to my family.

Q. Relate your experience.

A. Well, having been in this business for 28 years, my  
769 family think I know a little about garments made out of wool  
or wool and cotton, and when Mrs. Larzelere brings underwear  
for the children it is usually laid before me for inspection to see  
what it looks like and I examine it and tell her how much cotton I  
think is in it.

Q. Has it come to your notice from her statements to you that garments made partly of cotton have been purchased by her with these labels with the idea that they were all wool?

Mr. FRANCE. I object. It is improper, immaterial, and hearsay.

Examiner McKEAG. You may answer subject to objection.

A. I can not remember of ever having—of ever seeing a label in the house. The goods are usually unpacked and lying on the bed and I can't remember a single label. I do know that if they were made out of nothing but wool that we wouldn't want them because they would shrink so the children could not wear them, and I am in the worsted yarn business when I make that statement.

Q. You spoke of your business being in competition with, I think you used the phrase—

A. Up against.

Q. Up against.

770 A. Merino yarns.

Q. Which?

A. Merino yarns?

Q. Yes. I would like to know a little more explicitly what you have in mind when you say you are up against them.

A. Whenever a manufacturer, a customer of mine, uses a pound of merino yarn, he does not use worsted yarn on those machines.

Q. Let me ask you if you have had any experience which leads you to think that the so-called merino yarns are used in the ultimate disposal of the garments made of them to be sold as all wool garments.

A. Have I had personal experience of that kind, you say?

Q. Yes; in your business.

A. No.

Q. So you don't know, at all, that there is an unfair competition of these merino worsteds with all wool yarns?

A. An unfair competition?

Q. Unfair; yes.

A. No.

771 Q. Do you see any object in having garments made of wool and cotton labeled that way specifically?

Mr. FRANCE. I object to that as being subject to this inquiry and not for the opinion of the witness.

Examiner McKEAG. He may answer.

A. I will have to qualify my answer, Mr. Clark.



Q. You know what the word "Merino" means?

A. No; I don't. I understand that it means one thing in the trade, definitely. Well, the word merino means fine wool and nothing else, as comparable to a fine cashmere, for example, but it so happens that the word merino has been used in compositions of cotton and wool, certainly all the time I have been in the business, which is twenty-eight years, and it must have gone on a long time before that.

Q. You mean so used in the trade?

A. So used in the trade.

Q. I am speaking of the presentation of garments to the purchaser—to the average man—an unintelligent man. Do you see any object to garments made of cotton and wool being labeled specifically to that effect?

A. As merino?

Q. Instead of merino.

A. That's a pretty hard question to answer.

772 Q. You have stated that the term "Merino" has a special meaning in the trade; that, primarily, it means a fine wool, but that in the trade it means mixed cotton and wool. Am I correct so far?

A. You are correct.

Q. You know, too, don't you, that manufacturers of underwear do put the term "Merino" on the manufactured article as a label?

A. Yes.

Q. What I am trying to get at is whether in your observation that term "Merino" as applied to the product may deceive the average purchaser of underwear.

A. It does not deceive the jobber or retailer.

Q. I am trying to confine this to the consumer.

A. It would tend to do that; yes.

Q. So that the answer to the first inquiry as to whether there was an object in being more specific in the use of labels in this particular case adding the term "Cotton and wool" after the term "Merino," what would be your answer?

A. I believe that where a fabric is not all wool the public should know—by the public I mean the man or woman who buys  
773 the article itself over the counter—should know what percentage of cotton is in that fabric.

Mr. CLARK. That is all.

Cross-examination by Mr. FRANCE:

Q. Unless on the garment which the retailer sells over the counter, which is a garment of cotton and wool mixed, the percentages are indicated, the mere fact that the garment is sold as a cotton and wool garment won't do away with the fraud or possible fraud and misleading of the public, would it?

A. I don't know about that. I don't know—

Q. But you have—

A. I did not; if you will allow me, I will have to explain.

Q. Well, let it go at that. But you did emphasize the fact that the public should know the percentages—that they are entitled to know the percentages?

A. Yes.

Q. Your knowledge and opinion of what the average purchasing public may know about these things is based upon what?

774 A. Just personal observation among one's friends, you might say. For example I asked a man yesterday.

Q. I am not going to ask about that.

Mr. CLARK. I ask that the witness complete his answer.

Examiner McKEAG. No; but you may ask him any question you desire on redirect.

Redirect examination by Mr. CLARK:

Q. I think you have stated, Mr. Larzelere, that you suppose there are members of the public who, unless it is specifically stated that a garment is cotton and wool, may assume under these labels that it is all wool. Now, if they are ignorant that there is some cotton on the garment, is it not more important that they be apprised of the fact that there is some cotton even than that they should be apprised of the percentage, as the first step to their information?

A. You mean if there is cotton in the garment at all? Yes.

Q. Now, will you state any conversation you have had recently which has helped form your opinion on the subject that the public does not understand these terms?

Mr. FRANCE. I object, and ask that it be stricken out; and I want to put on the record objection to conversations had, as being purely hearsay.

775 Examiner McKEAG. He may answer, subject to objection.

A. I asked three men yesterday at the club in Philadelphia, at our table, what the word "Merino" meant to them. Two of them answered that it meant fine wool; one of them said that it might be calico for he knew. There is your public.

Mr. CLARK. That is all I care to ask.

Recross-examination by Mr. FRANCE:

Q. As a matter of fact, are not most garments that are on the market which are composed of all wool, specifically marked all wool, and so sold to the public?

A. Yes.

Q. Do you think that the average man when he purchases one of these garments, which is under one of these other labels, other than all wool, or pure wool, thinks that he is getting a pure-wool garment?

A. Yes; I do.

Q. Price varies, does it not, on these garments, so that a man goes into a store and he can get a range of price within a very considerable stretch, can he not?

A. Yes.

776 Q. And do you think that he expects to get pure-wool garments for a low price, just as he does for a high price when the garments are exhibited to him?

A. You will have to let me answer that in my way. I won't answer yes or no to that.

Examiner McKEAG. You may answer qualifiedly.

A. For example, I know of underwear that is being sold and marked "Australian wool," with cotton in it. It is misleading for it is not what it says. The price has nothing to do with it.

Q. A great deal of the underwear of the country now is put out under a trade-mark, without any indication at all of content, is it not?

A. Absolutely.

Q. And those manufacturers have a trade-mark and under that trade-mark they have varying grades, down to a comparatively low per centage of wool?

A. Absolutely.

Q. There is nothing to indicate to the purchaser of that garment, other than the price, what the wool content is?

A. Yes, sir.

Q. That is correct?

777 A. That is correct.

Q. In your opinion, is that a pretty open field for deception of the purchasing public?

A. There is no deception there at all, in my opinion, on the part of the manufacturer.

Q. I know; not on the part of the manufacturer, but on the part of the retail clerk that sells over the counter.

A. If that fabric is marked all Australian—

Q. I am not talking about that; I am talking about a garment marked under a trade name.

A. It does not matter what is in it?

Q. Yes.

A. If the public wants to buy it they can and if they don't like it they don't come back.

Q. It is within the province of the tradesman to say anything about that garment, as he sees fit?

A. Yes; he can say anything he wants about it.

Mr. FRANCE. That is all.

By Mr. CLARK:

Q. One more question. When you expressed the opinion that all-wool garments are usually labeled "All wool," you have no  
778 knowledge that enables you to say that that is the universal practice, have you?

A. Mr. Clark, when a man sells the best, he usually calls it the best.

Q. I am asking whether you have a sufficient observation to warrant your saying that all-wool garments are labeled "All wool,"

in the wide field of manufacture in this country. Have you the knowledge?

A. I can not say that I have.

Q. No. All right. That is all.

By Mr. FRANCE:

Q. One minute. Your opinions on that last subject are, to your mind, just as sound and as accurate as the opinions that you have expressed on most of the things here?

A. Yes.

By Mr. CLARK:

Q. It is not as accurate, is it, as the opinion you expressed as to what yarns are made of?

A. Well, I am talking about my own product, now.

Q. You would have a specific knowledge about that? Exact?

A. Yes.

By Mr. FRANCE:

779 Q. Is it just as true as the statements in regard to the general public and as to what their opinion is as to the various terms?

A. Yes.

(Witness excused.)

FRED S. PRATT was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Pratt?

A. Manufacturer of knit underwear.

Q. How long have you been in that business?

A. Thirty-three years.

Q. You have manufactured during that time some garments made of all wool?

A. Yes, sir.

Q. And what is the name of your factory?

A. George Rockwood & Company.

Q. I show you this [handing witness label with sample of cloth attached], marked "Commission's Exhibit No. 11," and ask you if that is a sample of the all-wool fabric that you have made.

A. Yes, sir; it appears to be.

780 Q. And call your attention to the label attached and ask you if that is the label you had prior to the year 1918 used in selling that garment?

A. 1918? Yes, sir.

Q. Will you state positively?

A. I should presume so; yes, this is the —

Q. What is the label?

A. "Natural wool"—"Natural wool shirts."

Q. Yes.

Mr. CLARK. I offer this in evidence.

Examiner McKEAG. It may be received in evidence.

Mr. CLARK. It consists of a label and sample.

Q. Will you state, approximately, if you can, the proportion of your all-wool underwear output to your whole output?

A. No; I could not.

Q. You have manufactured some all-wool garments for a great many years?

A. Yes, yes.

Q. How long?

A. Always; as long as I know.

Q. How long is that?

A. Thirty-three years. During the war; our Government contract; we would go a year or longer without making any all-wool—

Q. With that exception?

781 A. Yes; we have always made all wool, more or less.

Mr. CLARK. I think that is all.

Cross-examination by Mr. FRANCE:

Q. More or less, Mr. Pratt; the percentage of all-wool garments is a very small percentage of the manufactures?

A. Oh, yes.

Q. Very small, and you manufacture, just as do other manufacturers, mostly garments of cotton and wool in varying percentages?

A. Yes.

Q. To whom have you sold your all-wool garments?

A. Well, we sell to the jobbers and large retailers, any of them, through the country.

Q. I notice on that exhibit here [indicating] that there is your style here—ticket—and it says 100 per cent wool. When a garment which was made of the 100 per cent wool was sold to the jobber you specifically told him that it was a hundred per cent wool garment, didn't you?

A. Yes.

Q. The other garments which you sold as a manufacturer, which were not all wool, you gave the jobber the percentage  
782 of content—so much wool, so much cotton?

A. I don't sell the goods, but most jobbers, you know, will take it up—

Q. I am asking you how your plant sends out your goods. You say when you sent out this all-wool garment to the jobber, it is given to him—it is marked as 100 per cent wool.

Mr. CLARK. I object to this, as he has testified he does not sell—

Examiner McKEAG. How does he dispose of his output?

Mr. CLARK. The witness states he is not connected with the selling branch of his business. I, therefore, object that he can not answer as to that branch of his business.

Examiner McKEAG. The witness may answer, as far as he knows.

A. To answer your question, the selling agent does not ask the percentage.

Q. When you send out your goods to the jobber—when they are sold and the garment goes out—do you not indicate on your garments of cotton and wool what the percentage of cotton and wool is on your garments to the purchaser?

783 A. No; we do not.

Q. How do you sell them?

A. Why, the buyer thinks he knows what it is by the feel; he has got to get the content from the appearance and feeling of a garment, I should judge. I know we don't tell our salesman, so if he don't know I don't know how they would find out, unless they test it with some chemical test.

Q. Don't you know what the percentage of wool cotton is in the garment you turn out?

A. Surely.

Q. Don't you convey that information to the purchaser?

A. Not usually; we do if they ask it; very few ask it, indeed.

Q. How large an output—what is your connection with this George Rockwood & Company business?

A. I am a partner.

Q. That is a partnership?

A. Yes.

Q. So that you turn out your garments and sell them cotton and wool without any indication at all of their content?

784 A. No; I didn't say that. I say we gave them the proportion if they asked it, but very few ask it.

Q. What is your turnover in the year, Mr. Pratt?

A. Sixteen to twenty thousand dozens.

Q. And of that 16,000 to 20,000 dozens the percentage you send out specifically all wool is how much?

A. I couldn't tell you; I would have to look it up.

Q. Haven't you any idea at all?

A. It is small, as you say, a small percentage.

Q. Less than 5 per cent, isn't it?

A. Let's see—5 per cent would be one-fifth of the 20—would be 4, wouldn't it—4,000 dozen. Yes; I should say it was.

Q. What labels were you using on garments which were composed of cotton and wool prior to 1918?

A. Well, we changed our labels when we saw the decision in the trade journals, whenever that was. The decision was that wool shouldn't appear on the labels.

Q. When the Federal Trade Commission decided certain terms should not be used you changed?

A. Yes; when the notice appeared—before we received the  
785 letter, and it was February, 1919; we were all changed over then. I don't know when it was. It was when the decision was published in the trade journal. We left our wool off unless it was all wool.

Q. Prior to 1919 this label was used on mixtures of cotton and wool [indicating Exhibit No. 11]?

A. We understood then that if there was any wool in a garment it was a wool garment, and if they required it we would so mark it.

Q. Since the Federal Trade Commission decided that certain terms should not be used you have, since that time, applied this "Natural wool" label to only such garments as are 100 per cent wool?

A. Yes.

Q. Prior to that decision your 100 per cent wool garments which you sent out were specifically marked "All wool," or in some fashion to show that they were all wool?

A. Yes; I think so.

Redirect examination by Mr. CLARK:

Q. They were marked with this label, were they not [indicating Commission's Exhibit No. 11]?

Examiner McKEAG. Prior to November, 1918.

786 A. The decision was what we saw, and we acted on that.

Examiner McKEAG. Prior to that time is what we want to know.

A. Yes; prior to that time we used the wool—when it was a woolen garment we used the wool on the label.

Q. Mr. Pratt, you have testified, have you not, that prior to 1918 you put this label on your all-wool garments?

A. Well, we always put wool; yes. I don't know. Prior to that time we have always used that on all-wool garments.

Q. You have always used this label on all-wool garments?

A. No; not necessarily. Sometimes we would just say "All-wool shirts."

Q. But you have used this label also at times?

A. That is a familiar label.

Q. On what?

A. At what time?

Examiner McKEAG. Prior to November, 1918.

A. Yes. That was the date of your notice, was it?

Examiner McKEAG. Yes.

787 A. I don't want to get mixed on the date. It was after we saw the notice.

Q. You didn't understand, did you, that the Federal Trade Commission made any objection to all-wool garments being marked "All wool"?

A. No; I never knew they objected to that on an all-wool garment.

Q. This sample exhibit is all wool, isn't it [indicating Commission's Exhibit 11]?

A. Yes, sir.

Q. I call your attention to the label on the same exhibit, which is "Natural wool shirts."

A. Yes.

Q. Did you or did you not use the label "Natural wool shirts" on all-wool garments prior to 1918?

A. I should suppose we did.

Q. Don't you know that you did?

A. Well, I don't know that they read exactly "All wool" or whether it said "Natural wool." We gave that as an exhibit of a common label. There is no label that we use entirely for  
788 different customers, because sometimes they furnish their own labels.

Q. Have you, including the time prior to 1918, used the label "Natural wool." Exhibit 1?

A. I should say we had.

Q. On all-wool garments?

A. Yes.

Mr. CLARK. That is all.

Recross-examination by Mr. FRANCE:

Q. I want this, Mr. Pratt, clearly for the record, whatever the fact may be. Prior to your learning of the Federal Trade embargo on certain terms, you used this term "Natural wool shirts" on garments that were not all wool, because you thought—

Mr. CLARK. I object.

Mr. FRANCE (continuing). You used the label on garments that were composed of both cotton and wool, didn't you?

A. Prior to the decision?

Q. Yes; prior to the decision.

A. Yes.

789 Q. And is it not a fact that prior to the decision when you put out your garment all wool you didn't mark it the same as you did the garment which was made of cotton and wool, did you?

A. Not usually.

Q. You marked the garment which you sent out, before this change of terms, that was all wool, by the term "All wool," or something that indicated that it was a whole wool content?

A. Usually we did.

Q. And so you don't want to leave the impression here that prior to the action of the Trade Commission you used this label upon an all-wool garment and didn't mark it specifically "All wool"?

A. Not usually.

By Mr. CLARK:

Q. When you say "not usually" you mean you did sometimes?

A. If a customer would ask us to put a "Natural wool" label on, there wouldn't be any objection to putting it on an all-wool garment that I can see.

Q. I hand you a letter [handing witness paper] marked  
790 "Exhibit 12." It is a letter on the letterhead of Rockwood & Company, dated May 5, 1919, and ask you if you wrote that letter.

Mr. FRANCE. I object to this as cross-examination and impeachment of your own witness.

Examiner McKEAG. He may show the witness the document.



A. My partner wrote the letter.

Q. Now, Mr. Pratt, the question is—

A. My partner wrote that letter; Mr. Rockwood wrote it.

Q. Well, we want to have the facts in this matter. Do I understand from your testimony that sometimes your all-wool garments were labeled "All wool"?

A. Yes; usually.

Q. And is it a fact that sometimes this label and the one shown in Commission's Exhibit 11 were used on your all-wool garments?

A. He must have looked it up, and Mr. Rockwood—there is a copy of that same letter with him—

Q. I want to get at the fact, and I want to know your knowledge of it.

A. We would put that "Natural wool" label on—we would  
791 put it on all wool—on an all-wool garment.

Mr. CLARK. That is all.

By Mr. FRANCE:

Q. You put on the garment whatever the jobber said he wanted put on as a label?

A. At what time?

Q. Prior to the decision.

A. We wouldn't see any objection to putting a label on, in those days, on an all-wool garment.

(Witness excused.)

ARTHUR L. STRANG was thereupon called as a witness, and, having been first duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Strang?

A. Manufacturer of underwear.

Q. And what is your company known as?

A. The Mechanicville Knitting Company.

Q. What is your position there?

A. President and general manager.

Q. How many years have you been in that capacity?

A. Three years.

792 Examiner McKEAG. How long have you been in the industry?

A. Twenty-eight years.

Q. Are you familiar with the labeling of your output?

A. I am.

Q. And with the make-up of the garments with respect to the contents of wool and cotton?

A. Yes, sir.

Q. Have you ever made any all-wool underwear?

A. No, sir.

Q. What proportion of wool, if you can state, have you used in your garments, say in the last five years?

A. The majority, the most of our product has been only practically 5 per cent wool.

Q. And what labels have you used on those garments, if you recall?

A. Up to any certain period?

Q. Yes; you can distinguish between 1919—prior to 1919 and since.

Examiner McKEAG. Since prior to November, 1918.

A. Since 1918?

793 Examiner McKEAG. Since November, 1918.

Q. I want before and since.

A. Before we used—our principal label read “Men’s natural wool shirts,” “drawers.”

Q. And you have, in fact, discontinued that?

A. We did; we saw by the Trade Journal in November, 1918, that the Government prohibited the use of the words “Natural wool” unless it was on natural wool goods, and we immediately changed all our labels.

Q. Did you use any other labels prior to November, 1918, except “Natural wool”?

A. We used a great many labels that were furnished by the customers themselves. They would send us the labels, or they would send us the copy of a label and ask to have it printed. We would use the printing which they wished.

Q. You haven’t any of those with you?

A. No, sir; I have not.

Q. Can you recall them?

A. Yes, sir.

Q. I wish you would state as many as you can of labels that  
794 were put on garments that you manufactured prior to November, 1918.

A. The names of the customers?

Q. No, I don’t care for that; just the labels.

A. I can not give you the definite reading of the different labels, but I have copies of letters here from five different customers whose labels read “Natural wool” or “Merino.” We wrote these people that we couldn’t use their labels, and we returned the labels to them.

Q. About how many people do you sell to?

A. One hundred is perhaps a fair guess.

Q. Now, can you, from your recollection, state some of the labels that you used prior to November, 1918, other than “Natural merino”—“Natural wool”?

A. “Fine underwear” and a great many trade-mark labels furnished by the customers and perhaps some of them had no wording except “Men’s underwear.” I can not give you the exact wording, but most of them had the words “Natural wool.”

Q. Some had no descriptive terms?

A. Yes, sir.

795 Q. And some were “Fine underwear”?

A. Yes, sir.

Q. Can you think of any other variations? I would be glad to have them.

A. "Men's fine merino," "Gray mixed." Those are the only ones that I recall.

Q. Those are enough for the purpose.

Mr. CLARKE. That is all.

Cross-examination by Mr. FRANCE:

Q. What is the output of your plant, Mr. Strang?

A. About forty thousand dozens annually.

Q. And what is the highest wool content of the garments put out by you?

A. At any time? Do you mean that?

Q. Well, we will take the year—take the present year.

A. At the present time it is practically a cotton garment, with the exception of 5 per cent wool color.

Q. How do you market those goods now? Cotton or wool?

A. No, sir.

Q. How?

796 A. Men's fine underwear.

Q. Any indication of its content at all?

A. None whatever.

Q. In the products you put out to-day?

A. No, sir.

(Witness excused.)

(Whereupon, at 11.45 a. m. December 16, 1920, an adjournment was taken until 2 p. m. the same day.)

797

AFTER RECESS.

FRANK B. LENT was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. Mr. Lent, what is your employment?

A. I am attorney and examiner with the Federal Trade Commission, stationed in New York City office.

Q. And have you recently visited some of the manufacturers of knit underwear in this State and sought information as to labels used by them on their underwear prior to November, 1918?

A. Yes.

Mr. CLARK. I offer Commission's Exhibit No. 13 for identification.

Q. I show you these sheets containing labels, marked "Commission's Exhibit No. 13," and ask you to state where you procured them and what statement you can make as to what time they cover in their use.

Examiner McKEAG. The attorney is going to object. Ask where he got them.

Q. State where you got them.

798 A. I got these labels from Mr. William J. McFarland, superintendent of the Augusta Knitting Corporation's mill, at Utica, N. Y.

Q. What did he state regarding them as to whether or not they had been used by that company on their boxes containing underwear prior to November, 1918?

Mr. FRANCE. I object to this as immaterial, irrelevant, and incompetent and not proper testimony in this proceeding and I object to the exhibit as such also.

Examiner McKEAG. He may answer subject to objection.

A. Mr. McFarland stated that these labels had been used by the Augusta Knitting Corporation on part wool underwear, card 1918.

Q. That is, underwear of cotton and wool?

A. Yes.

Q. The second page is hangers used for garments contained in the boxes which were labeled in the boxes on the first page.

Mr. FRANCE. Same objection, and to save time, if I may be granted the same privilege, I will make the same objection to the other.

Examiner McKEAG. The exhibits will be received subject to counsel's objection.

799 (Commission's Exhibit No. 13, for identification, was thereupon marked in evidence.)

By Mr. CLARK:

Q. I show you a sheet containing a label marked "Commission's Exhibit No. 14"; make the same statement with regard to that.

A. I obtained this label from Mr. Dave Chalmers, president of the Chalmers Knitting Company, of Amsterdam, N. Y. Mr. Chalmers stated—

Mr. FRANCE. I object, on the same grounds.

Examiner McKEAG. He may answer subject to objection.

A. Mr. Chalmers stated that this label had been used by his company on part wool underwear prior to 1918.

Mr. CLARK. I offer Exhibit 14 in evidence.

Mr. FRANCE. Same objection.

Examiner McKEAG. It may be received subject to the objection.

(The document was thereupon marked "Commission's Exhibit No. 14," in evidence.)

Mr. FRANCE. I object on the same grounds.

Examiner McKEAG. The exhibit is received subject to the objection.

By Mr. CLARK:

800 Q. I show you Commission's Exhibit No. 15 and ask you to make the same statement on that.

Mr. FRANCE. I object on the same grounds.

Examiner McKEAG. The exhibit may be received subject to objection.

(The document was thereupon marked "Commission's Exhibit No. 15," in evidence.)

A. In regard to Exhibit 15 I received these labels from Mr. Green, who was in charge of the office of the Ford Knitting Company—I think that is the right name—of Waterford, N. Y., and Mr. Green

stated that these labels had been used by his company on part worsted underwear prior to 1918.

Examiner McKEAG. Part worsted underwear? What do you mean?

The WITNESS. I mean worsted and cotton.

By Mr. CLARK:

Q. I show you a sheet marked "Exhibit 16" and ask you to state as to that in the same respect.

Mr. FRANCE. I make the same objection.

Examiner McKEAG. The same ruling.

(The document was thereupon marked "Commission's Exhibit 16," in evidence.)

801 A. Referring to paper marked "Commission's Exhibit 16,"

I obtained these labels from Mr. Franklin Fuld, of Fuld & Hatch, which is a firm conducting knitting mills at Albany, N. Y. As to the first label on this sheet, the one which contains the words "Sanitary Australian wool," Mr. Fuld stated that this label had been used by his company on part worsted—that is, worsted and cotton garments—prior to 1918. As to the other two labels on this sheet, namely, the one containing the words "One button union suit" and the one containing the words "Merino (wool and cotton)," Mr. Hatch stated that these two labels have been used by his company part—the first one the "One-button union suit" label—has been used on both all cotton and worsted and cotton since the war and the second one has been used on wool and cotton since the war.

By Mr. CLARK:

Q. Since the beginning of the war?

A. Since the end of the war. The firm was engaged entirely in Government work during the war.

Mr. FRANCE. The same objection.

Examiner McKEAG. This may be received subject to the objection.

(The paper was thereupon marked "Commission's Exhibit No. 16," in evidence.)

802 Mr. CLARK. That is all.

(Witness excused.)

HUBERT F. SOMMER was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business?

A. Manufacturer of ladies' and children's knit underwear.

Q. What is the name of your company?

A. Wakefield Knitting Mills.

Q. You make no underwear except women's and children's?

A. We make an infant's wrapper. We have made that lately, but not previously.

Q. You don't make men's underwear?

A. Not at all.

Q. Are you familiar with the labels used on your product?

A. Most of them.

Q. Can you state whether you have used on the Wakefield underwear the labels "Natural merino" or "Merino"?

A. I am quite sure we have never used anything like those two names.

803 Q. How about the label "Natural wool"?

A. No; nor that.

Q. Or "Gray wool"?

A. I can remember no instance where we had "wool merino" or anything on our labels or hangers. There is only one number in our garments that contains some merino, but it is not specified.

Q. I show you Commission's Exhibit 17, and ask you if that is one of the labels which the Wakefield company has used in the past and also if that hanger pinned to the paper label is the hanger which the Wakefield company has used.

A. It is, sir.

(The document was thereupon received in evidence and marked "Commission's Exhibit No. 17.")

Q. Do you make any all-wool garments?

A. Not all wool; no, sir.

(Witness excused.)

JOHN M. BURKETT was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

804 Q. Mr. Burkett, what is your position?

A. I am examiner in the Federal Trade Commission, stationed at Washington.

Q. Did you recently visit some shops in Washington for the purpose of purchasing Winstead underwear?

A. I did.

Q. Did you purchase garments that were contained in boxes bearing the Winstead company's mark?

A. I did.

Q. Will you state what garments you purchased, as to the label on the boxes containing the respective garments, and where?

A. I purchased—

Mr. FRANCE. I would like to interpose an objection that it is irrelevant, incompetent, and immaterial.

Examiner McKEAG. You may answer, subject to objection.

A. I purchased one undershirt with the label of the Winstead Hosiery Company in the collar from a box labeled "Natural wool" at the Palais Royal, Eleventh and G Streets, Washington. I also purchased at that store another undershirt with the Winstead Hosiery Company label in the collar and with the words "Natural merino" on the box from which the garment was taken. Do you wish the other purchases?

805 Q. Yes.

A. I also purchased at the gent's furnishing store of R. T. Sissel, 1302 F Street, a garment with the label of the Winstead Hosiery Company in the collar and taken from a box labeled "Gray wool." I also purchased from the Sissel store another undershirt with the Winsted Hosiery Company label in the collar and the words "Gray merino" on the box from which the garment was taken.

Examiner McKEAG. When?

The WITNESS. These goods were purchased the 10th of December, 1920.

By Mr. CLARK:

Q. Did you subsequently take these garments to the Bureau of Standards in Washington after being purchased and deliver them to official in charge of the Bureau of Standards, Department of Commerce, which is a Government institution, for examination as to amount of percentage of wool in each garment?

A. Yes.

Q. Did you at that time mark them for identification?

A. Yes, they were all marked so that I could identify any one of the four.

806 Q. How were they marked, by attaching a tag or otherwise?

A. Those purchased from the Palais Royal were stamped with a rubber stamp with the words "Palais Royal"; the two purchased from R. T. Sissel bore the signature of R. T. Sissel and—

Q. On the garment itself?

A. On the garment. The two shirts from the Palais Royal also bear different numbers which were fastened onto the garment previous to the purchase. Those purchased from R. T. Sissel had the price tag fastened to the garment by which I can identify them.

Q. I will show you Commission's Exhibit No. 18, purporting to be a report by the Bureau of Standards of the results of an analysis of certain samples submitted to them for test. The different articles so submitted are described here as "Palais Royal 4463, Palais Royal 4468, R. T. Sissel 1, R. T. Sissel 2," and I ask you to identify each of those as to the label under which it was sold.

A. Palais Royal 4463 was on the garment taken from box labeled "Natural merino"; Palais Royal 4468 was taken from the box labeled "Natural wool"; R. T. Sissel No. 1 was taken from the box labeled "Gray wool"; R. T. Sissel No. 2 was taken from the  
807 box labeled "Gray merino."

Mr. CLARK. I offer as Commission's Exhibit No. 18 a report of the analysis of the exhibit identified by the witness from the Bureau of Standards.

(The document was thereupon marked "Commission's Exhibit No. 18," in evidence.)

Mr. CLARK. I offer in evidence garment marked "Palais Royal 4463," with sample purporting to be cut therefrom with the same marks, including what purports to be the residuum, after the chemical test by the Bureau of Standards and marked "Commission's Exhibit

19," and I offer in evidence "Palais Royal 4468" and a sample cut therefrom including the residue of a part of it, after a chemical test by the Bureau of Standards, also marked "Palais Royal 4468." I offer in evidence garment marked "R. T. Sissel No. 1," with a sample cut therefrom, including a residium of part of it after test by the Bureau of Standards similarly marked, "Commission's Exhibit No. 21."

I offer in evidence garment marked "R. T. Sissel No. 2," with sample cut therefrom including the residium of a part of it, after a chemical test by the Bureau of Standards, similarly marked, "Commission's Exhibit No. 22."

Examiner McKEAG. These garments, marked "Exhibits 19 and 22," are the same garments that you purchased at the Palais  
808 Royal and R. T. Sissel?

The WITNESS. Yes.

Mr. FRANCE. I want to put on the record an objection that it is immaterial and irrelevant, raising no question as to method of proof.

Examiner McKEAG. They may be received in evidence, subject to the objection.

(The garments above referred to were thereupon marked "Commission's Exhibits Nos. 19, 20, 21, and 22.")

By Mr. CLARK:

Q. In making these purchases, Mr. Burkett, did you ask the salesmen as to the quality of these goods, in respect as to whether they were all wool or not?

A. I did.

Q. Will you please state what was told you in response to such inquiry?

A. I—

Mr. FRANCE. I want to object that it is immaterial, incompetent, and irrelevant.

Examiner McKEAG. He may answer, subject to objection.

A. The salesman from whom I purchased the goods at the  
809 Palais Royal said that they were all wool, and—

Q. What were the labels on the garments there?

A. "Natural wool" and "Natural merino." I asked him a second time and he repeated his former statement and said that they were all wool. As to the statement made by R. T. Sissel, he said they were not all wool, and he gave me the percentages as he thought they were.

Q. Do you know what he said as to the percentages? State that.

A. He said the garment labeled "Gray wool" was about one-third wool, and that the garment labeled "Gray merino" was between 50 and 60 per cent wool. He said that the Winsted people did not tell him the percentage of wool, but that he had asked the salesman of the company the percentage.

Q. What was the source of his information, did you understand?

Examiner McKEAG. This was a salesman at the counter?



The WITNESS. This was the proprietor, Mr. R. T. Sissel, at the second store.

Mr. CLARK. That is all.

By Mr. FRANCE:

Q. Did you pay for these garments?

A. No, sir. I did not.

Q. Have you any idea what the price was?

810 A. Yes, sir. Each one, do you mean?

Q. Yes.

A. The natural wool garment was sold for \$3; the natural Merino garment, for \$2.75; the gray wool garment—

Mr. CLARK. Where were they bought?

The WITNESS. The first two from the Palais Royal. The gray wool garment was sold for \$2.50, the gray merino garment for \$3.

By Mr. FRANCE:

Q. He told you, Sissel told you, that No. 1 was about one-third wool?

A. That is right.

Q. Is he his own buyer from the Winstead Company?

A. Yes, sir; as he told me.

(Witness excused.)

FRANK B. LENT was thereupon recalled as a witness, and, having been previously duly sworn, testified as follows:

Direct examination by Mr. CLARK:

811 Q. What were the dates when you obtained the labels which you have described in your previous testimony?

A. I obtained the Augusta labels December 8, 1920; the Chalmers labels December 9, 1920; the Ford labels December 10, 1920; and the Fuld-Hatch labels, December 10, 1920.

Q. I show you a sheet containing a similar label, marked "Commission's Exhibit No. 23," and ask you to state when and where you obtained that?

A. I obtained this label yesterday, December 15, 1920, from Mr. H. L. Rowe—I did not, either—I would have to ask about that, Mr. Clark. I don't believe you understand just where I obtained this label. On December 15, 1920, I called at the office of A. S. Haight & Company, Worth and Church Streets, New York City, and I saw there Mr. H. L. G. Meyer, who stated he was one of the partners. Mr. Meyers stated that this company is selling agents for the Dunham Mills of Hartford, Connecticut, and have been selling agents for the Dunham Mills for some years, since before 1918. Mr. Meyer stated that the Dunham Mill made all wool—

Q. One moment—

Mr. FRANCE. I am going to object to that on the same grounds.

812 Examiner McKEAG. You may continue, subject to the objection.

A. All wool and part wool, and I believe some cotton underwear, and have been making all wool and part wool underwear for some years, at least since 1916. Mr. Meyer showed me some boxes containing underwear; one box had style No. 1305 on it and Mr. Meyer said it contained part wool underwear, and it was labeled with a label of which this Commission's Exhibit No. 23 is a copy, except that the label on the box had style number and size stamped on it, and also had a stamp on it, in a rubber stamp the date, October 3, 1916—October 9, 1916. Mr. Meyer stated that this company has used this type label on part wool underwear since 1916. Mr. Meyer said they might have used some other labels also, but they used that one anyway, and they have also, according to Mr. Meyer, used the label on all-wool underwear since 1916, and perhaps for some years before that time. Mr. Meyer also showed me one of their all-wool garments which had two hangers sewed in it, one hanger had the name of the company and the other had the words "All wool," and some other words on it. He stated that it has only been for 813 the past year that they marked their all wool goods "All wool," and they only marked them with this hanger which he showed me.

Mr. CLARK. I offer Commission's Exhibit No. 23 in evidence.

Mr. FRANCE. I make the same objection.

Examiner McKEAG. It may be received, subject to the objection.

(The document was thereupon marked "Commission's Exhibit No. 23," in evidence.)

Mr. CLARK. I offer in evidence Commission's Exhibit No. 24.

Examiner McKEAG. Commission's Exhibit No. 24, with the label attached thereto, is received in evidence.

(Commission's Exhibit No. 24 was received in evidence.)

Mr. CLARK. I offer in evidence and read into the record the following, as the definition of "Merino" taken from Webster's New International Dictionary from the edition of 1920, as marked on the title-page:

"Merino, a. (Sp.; cf. Sp. *merino* moving from pasture to pasture, *merino*, a royal judge and superintendent or inspector of sheep walks, LL. *merinus*, fr. *marjorinus*, i. e., major villae, fr. L. *major* greater.

See Mayor. Merino sheep are driven at certain seasons from 814 one part of Spain to another in large flocks for pasturage.) 1.

Designating, or pertaining to, a brand of fine-wooled white sheep originating in Spain and afterwards widely popular, esp. in America and Australia. The males have heavy spirally twisted horns; the ewes are hornless. In the better varieties the skin hangs in heavy folds, esp. above the breast, shoulders and thighs. The breed excels all other in the weight and quality of its fleece, but does not rank high as a mutton producer.

"2. Made of merino."

"Merino, n.; pl. Merinos (-noz). (Sp. See Merino, a.)

"1. A merino sheep.

"2. A fine fabric made originally of merino wool, but later a fine wool mixed with cotton.

"3. A fine woolen yarn used in hosiery, underwear, etc."

Mr. CLARK. I offer in evidence an extract from a volume entitled "Wool, the Raw Materials of the Woolen and Worsted Industries, by Stanley H. Hart, lecturer on the raw materials of the wool industry, Philadelphia Technical School. Edited by Edward W. France, director of the Philadelphia Technical School."

I ask that it be made a part of the record.

815 "33. *Merino wools of the United States.*—American merino wools, with one small class excepted, are divided into two classes, 'domestic' and 'territory.' The domestic merino wools are those grown in the Eastern and Central States. The principal States growing domestic merino wools are Ohio, Pennsylvania, West Virginia, New York, Michigan, Vermont, and Indiana. The most important section is the Ohio River Valley, and comprises Ohio, southwestern Pennsylvania, and the eastern part of West Virginia. These fine wools compare favorably with any in the world, and are fully equal to the finest Australian. They are unusually sound and strong, and are the most valuable of American wools. The domestic wools are as a rule almost entirely free from burrs and dirt. They represents the actual grease and suint, and is very uniform. Special attention is given to breeding, the sheep being housed and given every possible attention. In addition to the term 'domestic,' these wools are also known as 'eastern,' 'fleece,' 'farm,' and 'native' wools. The length of these domestic merino wools from the Ohio Valley are known as 'delaine' wools, and are obtained by careful selection in breeding. The Delaine merino sheep are between the American  
816 and Rambouillet for size. Rams weigh from 140 to 200 pounds and ewes from 100 to 150 pounds. The fleece is lighter shrinking than the other two types just mentioned, and the weight runs from 9 to 18 pounds. The length of fiber in Delaine wools makes them especially adapted for worsted yarns. The term 'delaine' is often applied to all 'domestic' merino combing wool grown in this country. Territory combing wools are usually known as 'staple.'

"34. *Territory wools.*—The territory wools, also known as 'western' and 'range' wools, are those grown in the States of Montana, Wyoming, Idaho, Nevada, Utah, Arizona, New Mexico, and Colorado. Most of the wool produced in Washington, Oregon, and the Dakotas is classed as territory wool. At one time all wools grown west of the Missouri River were classed as territory wools. The name 'territory' was given to these wools because they were grown in the western part of the country which had not been admitted to statehood. The term 'ordinary' is sometimes used for 'clothing' or 'carding' territory wools. It will be noticed that the States named comprise the Rocky Mountain plateau. The sheep-producing territory wools graze over the open ranges and are very hardy. They seldom receive any housing or protection from winter storms and

blizzards, and are rarely furnished with fodder. The cold  
 817 winters cause the sheep to grow heavy fleeces. In summer the  
 flocks often suffer through long droughts, causing a scarcity  
 of water and poor pastures. At its best the grass is never so plentiful  
 or rich in this region as in other parts of the country. Tenaceous  
 burrs abound in the greater part of the ranges, and become entangled  
 in the fleeces. The burr picker is frequently helpless to remove the  
 burrs from the grease wool, and this necessitates the use of the car-  
 bonizing process later to remove the burrs.

"The soil on most of these western ranges is sandy and alkaline.  
 The nature of the soil, sickness due to insufficient nourishment at  
 various times, and exposure weaken the wool in the fleeces of these  
 sheep, and at its best territory wool never equals similar domestic  
 wool. Most of this territory wool runs from 1.5 to 3 inches in length.  
 The fiber is fine, but weak, tender, and harsh. The territory wools  
 have a very high shrinkage, due to the large quantity of sand, which  
 adheres to the yolk in the fleece."

Examiner McKEAG. It may be received.

Mr. CLARK. I offer in evidence Commission's Exhibits 25 and 26,  
 being the forms of questionnaire sent to individuals, and in-  
 818 cluding the questionnaires which were shown to certain of the  
 individuals to whom these were addressed, as shown by the  
 record, on an examination at Washington and New York City, and  
 including a tabulation of the results of the questionnaires, Commis-  
 sion's Exhibit No. 25, as collected from the questionnaires filed, which  
 were filled in and signed and returned to the commission, attached  
 to the tabulation and preliminary statement signed by H. L. Ander-  
 son, assistant chief examiner.

(Commission's Exhibits Nos. 25 and 26 were then received in evi-  
 dence.)

Mr. CLARK. I offer in evidence Commission's Exhibit No. 27.

Mr. FRANCE. I object, that it is irrelevant and immaterial to this  
 proceeding, but no objection is made as to the competency of the  
 proof.

Examiner McKEAG. I understand you concede the authenticity of  
 the result, but deny its materiality, because it is an action that has  
 been taken since the institution of these proceedings.

Mr. FRANCE. Yes.

(Commission's Exhibit No. 27 was thereupon marked in evi-  
 dence.)

819 (Mr. Clark then read Exhibit No. 27, as follows:)

CHICAGO, ILLINOIS, November 18, 1920.

FEDERAL TRADE COMMISSION,

1100 Browning Building,

14 West Washington Street, Chicago, Illinois.

GENTLEMEN: At the suggestion of a representative of your office  
 we yesterday brought to the attention of the board of directors of  
 our association, who were in session here, the investigation which is  
 being conducted by the Federal Trade Commission regarding the

use of certain brands on knitted underwear which was not of pure wool, and which terms might be construed as misleading. The definite terms specified, we understand, were the following: (1) "Natural merino," (2) "Gray wool," (3) "Natural wool," (4) "Natural worsted," (5) "Australian wool."

The following is quoted from the minutes of that meeting, approved by the board of directors:

"It is the sense of the board of directors of the National Association of Retail Clothiers that the terms (1) 'Natural merino,' (2) 'Gray wool,' (3) 'Natural wool,' (4) 'Natural worsted,' (5) 'Australian wool,' used as a brand or name on underwear that contained cotton or other adulterant than wool or on the box containing such underwear, might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated, and that such misleading terms should not be used."

It is at the suggestion of this same representative your body that we are forwarding the above information to you.

Very truly, yours,

NATIONAL ASSOCIATION OF RETAIL CLOTHIERS,  
(Signed) CHAS. E. WRY, *Secretary*.

Examiner McKEAG. The exhibit may be received in evidence, subject to Mr. France's objection as to its materiality.

(Commission's Exhibit No. 27 was thereupon marked in evidence.)

821 Mr. CLARK. It is stipulated in supplementing the evidence of the witness, John I. Morton, previously examined on behalf of the commission, in accordance with the stipulation of counsel for respondent then made, that the following statement of the business of John E. Hanifen Company may be taken as evidence and in lieu of testimony:

"Our business is that of manufacturers of a general line of knit cloths and men's underwear. The average annual sales of all of our products for the past five years has been from three hundred thousand to five hundred thousand dollars, of which amount about one-third would be for underwear, and of the amount of the latter about one-half would be for underwear made of all wool. The year 1918 was our banner year for the amount of sales, the same being close to one million dollars, but our net profits for that year were actually smaller than those for other years. We sell all over the United States, our sales being made direct and through commission houses in New York City."

(Witness excused.)

GEORGE E. MILLER was thereupon called as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

822 Q. Mr. Miller, you are connected with the W. E. Tillitson Manufacturing Company?

A. Yes, sir.

Q. In what capacity?

A. As president and general manager.

Q. And what is their business?

A. The business is the manufacture of knit underwear, worsted and woolen.

Q. Does that include all-wool garments?

A. It includes all-wool garments.

Q. And you manufacture all-wool garments for how many years, approximately?

A. The company has manufactured all-wool garments for forty years.

Q. Can you state generally the proportion of all-wool underwear product to the whole output?

A. Our—

Mr. FRANCE. I object to that, because there is no basis shown on which this witness can give such an opinion.

Examiner McKEAG. He is their general manager.

A. Our proportion of all wool to our total business is approximately 82 per cent.

Q. And can you state, approximately, the total turnover of your business?

A. Normally, three and one-half million.

Q. A year?

A. A year.

Q. And do you sell your all-wool garments throughout the United States?

A. Throughout the United States; yes.

Q. You are acquainted with the labels that have been used by the company on its containers of its all-wool garments?

A. I am acquainted with those we use now, and acquainted to a certain extent with those they have used in the past.

Q. I show you this sheet [handing witness paper] marked "Exhibit 28," and containing four labels, and ask you if those have been used on all-wool underwear manufactured by you?

A. They were used prior to December of last year.

Q. Yes.

A. Yes.

Q. They were?

824 A. Yes.

Q. And will you please read those labels as they appear there?

A. There is one that is "Random natural-wool" color; second, "Natural wool random"; the third one is "Natural wool." The fourth is "Fine natural wool."

Q. And they have been used on containers of all-wool garments for some years prior to 1919.

A. For some years, so the record shows.

Q. At any rate prior to December, 1918, say?

A. Yes.

Q. Do you know some other companies who manufacture all-wool underwear?

A. Yes.

Q. Will you name some that you know?

A. Wright.

Q. Where are they located?

A. They have a selling office in New York; where their mill is I can't tell you.

Q. Do you know the whole designation of the business?

A. I don't remember whether it is the Wright Knitting Company or the Wright Company. I can't be sure. I know them by labels more than anything else.

825 Q. All right.

A. Jaeger is another one, the Vassar Knit Goods Company, the Lake Mills. I could go on indefinitely.

Q. Of course, we understand this is only your recollection.

A. The Ypsilanti Knitting Company. Those are all I can testify make absolutely all-wool propositions. The rest make wool and cotton.

Q. These labels which you have referred to which carry the terms "Natural wool" and "Fine natural wool" also carry the words "Men's shirts," do they not?

A. Men's shirts.

Mr. CLARK. I offer this commission's Exhibit No. 28 in evidence.

Examiner McKEAG. It may be received in evidence.

(Commission's Exhibit No. 28 was thereupon marked in evidence.)

By Mr. CLARK:

Q. Have you had some experience in the purchase of wools?

A. Some, yes; limited.

Q. Will you state the terms used in the wool market used to designate the different grades of wool for knitting purposes—knitting yarns?

826 A. Well, there is a merino and Ohio, Delaine; there is Texas territory, Texas long staple, Montana. There is a lot of them.

Q. That is enough, I guess for the present purpose. What do you understand by merino as applied to wool?

A. Merino is used as a trade colloquialism.

Q. As to wool?

A. As to wool and merino wool may be, as I understand, is a three-fourths blood merino blood merino sheep.

Q. In your business in making all-wool underwear, you use merino yarns?

A. We are not using them now.

Q. And what do you understand by the term merino yarn—I mean yarns composed wholly of merino wool?

A. We are not using them now; no.

Mr. FRANCE. I object to that question, because it assumes something that I don't think is a fact, that has not been shown.

Mr. CLARK. I am stating the meaning. I am not assuming that as a fact.

Examiner McKEAG. Is there any all-wool merino yarn?

The WITNESS. We are not using them.

827

By Mr. CLARK:

Q. There is such a yarn?

A. There is such a yarn.

Examiner McKEAG. Meaning made from pure wool?

The WITNESS. Oh, yes.

Mr. FRANCE. I know nothing about wool.

The WITNESS. We use all-wool yarn, but no merino yarns.

By Mr. CLARK:

Q. Do you spin your own yarns?

A. Yes.

Cross-examination by Mr. FRANCE:

Q. Do you manufacture anything else except underwear in your plant?

A. Oh, yes. We manufacture woollens and worsteds.

Q. Yes. And when you were giving your percentages of 82.82 per cent all wool, you referred to your entire output, did you not?

A. That is what I said; yes.

Q. That had no reference to your underwear?

A. No.

828 Q. Now, of your underwear what percentage is all wool?

A. About 76 or 77 per cent.

Q. Is an all-wool garment?

A. Yes.

Q. And what is your output on underwear—I assume the three million and a half referred to the entire plant?

A. Yes. Our normal output of underwear would be about a million six hundred thousand dollars.

Q. You referred to certain concerns that make all wool—you didn't mean by that they were exclusively manufacturers of underwear?

A. Not at all.

Q. And it is also a matter of general trade knowledge, is it not, that the Jaeger people do not manufacture their product?

A. I have been trying to find out to-day, because I am very much interested, and I can not find out. Three sources told me they did, and one told me they didn't and I don't know.

Q. Now, what is a worsted merino yarn?

A. A worsted merino yarn?

Mr. CLARK. That is limited to the use of the term in the trade?

829 Mr. FRANCE. That is what we are talking about—the industry—and that is all we have been talking about.

A. We didn't use a worsted yarn for underwear.

Q. I am asking you what worsted merino yarn is.



A. We understand by worsted merino—our superintendent uses it—is anything that has three-fourths blood merino. He calls that merino, and that worsted yarn is a twisted yarn.

Q. Is it not a fact that in the knit-goods industry that worsted merino has been used for a yarn which is composed of cotton and wool?

A. Absolutely true.

Q. Yes; that has been the universal practice and definition in your industry all the time you have been in it?

A. That is true.

Q. Now, coming to the question of the definition of merino, as applied to wool, merino is a grade, is it not, and so employed in your industry?

A. It is in the industry and not in our mill. I might differentiate.

Q. In the industry?

A. In the industry.

Q. It represents a grade and—

830 A. Surely, surely.

Q. Do you manufacture garments—underwear garments—composed of cotton and wool?

A. Yes.

Q. And in the trade garments so manufactured of cotton and wool have been known as merino, have they not?

A. Yes.

Q. And that has been universal so for many years?

A. Universally so.

MR. CLARK. Your last statement relates solely to the understanding in the trade, does it not?

THE WITNESS. Yes.

MR. CLARK. The grade merino may be wool from the merino sheep, may it not?

THE WITNESS. It may; yes.

MR. CLARK. It includes, in other words, wool from the merino sheep?

THE WITNESS. Yes.

By MR. FRANCE:

Q. But it also includes wool which does not come from merino sheep, but is of a high grade?

831 A. Yes; there are two branches of the textile industry and one is a worsted one—in our mill it is a worsted proposition in which an entirely different set of terms and meanings exist. That is the worsted cloth and when we get into the knit there is an entirely different colloquialism and terms.

(Witness excused.)

(Whereupon, at 4.00 o'clock p. m., on the 16th day of December, 1920, the above hearing was adjourned until December 17th, 1920, at 10.00 o'clock a. m.)

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NEW YORK, N. Y., *December 17, 1920—10 a. m.*

Met pursuant to adjournment.

Appearances same as before.

WILLIAM M. STEWART was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. You are connected with the Government Census Bureau in Washington?

A. I am now the Assistant Director of the Bureau of the Census; formerly I was chief statistician for manufacturers.

Q. Was that your position at the time of the taking of the census of 1914?

A. At that time I was chief statistician for manufacturers, Bureau of the Census.

Q. And did that branch of the work cover the collection of statistics as to the manufacturers of textiles?

A. It did.

Q. Have you a copy of the Government reports of the census of 1914 and prior years covering the return from manufacturers  
833 of textiles—of underwear?

A. I have with me a copy of the report of the census of 1914 on the manufacturers of hosiery and knit goods. This report gives the figures for 1914 and in comparison, the figures for two or three prior censuses—three prior censuses.

(Commission's Exhibit No. 29 being a printed pamphlet entitled "Census of Manufacturers, 1914," was thereupon marked for identification.)

Mr. CLARK. I call your attention to page 17 of the Commission's Exhibit No. 29, being a printed pamphlet entitled "Census of Manufacturers, 1914," and I call your particular attention to the part of that sheet headed "Table 21" and ask you if the part of Table 21 headed "Shirts and drawers" covers the terms of the census of 1914 for knit goods—underwear?

A. It does.

By Mr. CLARK:

Q. Will you state the method used in gathering those figures?

A. Do you want a full detailed description of the method followed in gathering those figures?

Q. No; the general methods.

834 A. The general method was, first, to establish the form of the questionnaire, or schedule, that would be sent to every manufacturer.

Q. Have you a copy of that with you?

A. I have. The form of that schedule was established by conference with manufacturers engaged in this branch of industry and others that were familiar with the terms used in the industry and the desires of the industry for certain classes of products for statistics concerning certain classes of materials and products.

Second, to compile a complete list of all manufacturers engaged in this industry.

Third, to collect reports from all the manufacturers engaged in the industry, either by the use of the list by the mail or by special agents who visited the manufacturers.

Fourth, to make a correct tabulation of the figures reported by each manufacturer.

Fifth, to summarize that tabulation and prepare the tables for the published reports.

That is a brief description.

Q. I call your attention to the second printed page of this questionnaire or schedule which is marked Commission's Exhibit 30, and to the terms under the heading "Shirts and drawers," separately, and ask you how the classification which appears below the heading, namely, "Cotton wool merino" was adopted for the purpose of the census?

A. That classification, and in fact all the classes of product enumerated in this schedule was adopted, as I have said before, after conference with the manufacturers to ascertain the terms used in the industry for the designation of certain products.

Q. In collecting the figures of manufacturers under this heading, and under these classifications, cotton, wool, and merino, was the intention and understanding to segregate the all-wool underwear from underwear made entirely from cotton or made of wool and cotton?

A. It was.

Q. And do the total figures—returns—in Commission's Exhibit No. 29, to the best of your belief, from your observation of the collection of this census, represent the total underwear in the three classes, the one under the heading "Wool" being wool?

A. Why yes; the figures there for all wool, for instance, all-wool shirts and drawers is a total of the articles reported by each manufacturer, as manufactured from wool exclusively. If he manufactured cotton goods exclusively he reported it as cotton goods; if he used both cotton and wool fibre or yarn he reported as merino goods, and we simply summarized the totals reported by each manufacturer after being certain that the manufacturer understood the inquiry and reported his total product for the year.

Q. Have you recently made an examination of some of the returns made in this particular census for 1914?

A. Yes; after you told me that I would be summoned as a witness here, I looked up quite a large proportion of the reports made for the census of 1914.

Mr. FRANCE. I want to put on the record an objection to all this as immaterial, irrelevant and incompetent.

Examiner McKEAG. You may answer subject to objection.

Mr. CLARK (to the witness). Continue.

A. Yes, I did examine quite a large proportion of the schedules made for the 1914 census.

Q. And what was the result of that investigation, so far as confirming the understanding that you have stated as to what these figures represent?

837 A. It confirmed my understanding. I simply examined the schedules to be certain of my recollection that the practice followed in the census of 1914 was true.

Mr. CLARK. I offer in evidence Commission's Exhibits Nos. 29 and 30.

(Commission's Exhibits Nos. 29 and 30 were then received in evidence.)

Cross-examination by Mr. FRANCE:

Q. In preparing the divisions under which merchandise should be tabulated under this Table 21 referring to underwear there was not any question at all as you found in the industry, as to the use of this term "merino" to define a certain class of underwear?

A. No, I recall no misunderstanding in that respect.

Q. That was a term which you found in use as a census man was universally employed to define a garment which was a combination of wool and cotton?

A. So generally employed and accepted; yes.

838 Q. Has there been any change since the taking of this census as to the method employed, particularly as to the year 1920, in this field?

A. You mean as to the census of 1914?

Q. Yes.

A. Yes; there has been some changes in the census from each census; before establishing the questionnaire it is the practice of the bureau to consult manufacturers and experts in each branch of the industry in the endeavor to get the schedule corrected to represent conditions existing at the time of the enumeration. The schedule for 1919 does not follow the same form in some respects as the schedule of 1914. More detailed information was demanded in regard to products, and the schedule was formulated in the endeavor to meet that demand, but at the same time to preserve the comparability of the statistics for 1919 with those for 1914.

Q. Are you quite sure that the manufacturers in filling out this blank, which is known as Commission's Exhibit No. 30, in putting under the term wool the number of garments made, that the manufacturers only put under these the garments which were made totally of all wool?

A. You will see from the inquiry just preceding the one you had in mind calls for the class of materials used by the manufacturer.

839 If a manufacturer reported "cotton and wool," as his material, and reported only a wool garment in reply to the inquiry, the schedule would indicate a misunderstanding on his part as would be returned to him for correction, and I do not recall any case in which a manufacturer reported all-wool garments when he used both cotton and wool as the material. That was one of the methods used by the bureau to verify the figures and correct them.

Q. Well, in the industry, at least in the year 1914, it was customary to consider, or to denominate garments which were not all wool as woollen or worsted, was it not?

A. I am not aware of that, but the object of the census was to have a man report wool garments when they were composed of wool, and cotton when composed of cotton, and merino when composed of both wool and cotton, and we endeavored to hew very close to that terminology.

Q. But it is quite possible that under this census of 1914, in arriving at the quota of garments which are marked wool, which are given as 485,328 as against 2,113,810 from merino that is manufactured in their industry had considered wool garments as those which contained wool in certain percentages, regarding woollen garments and worsted garments as wool garments, then there might be very possibly  
840 errors in that computation of yours?

A. I do not believe it very possible, and I do not believe any errors of that kind crept into the census. We examined each report very carefully and carried on quite a large correspondence with the manufacturers and sent agents to them to correct their returns, having the definite understanding that wool garments were composed of wool almost exclusively.

(Witness excused.)

LINCOLN CROMWELL was thereupon recalled as a witness, and having been previously sworn testified as follows:

Direct examination by Mr. CLARK:

Q. In your previous testimony, I think, Mr. Cromwell, you referred to the fact that during your administration of the war underwear purchasing bureau you had adopted the practice of having goods made of cotton and wool so called?

Answer. Yes.

Q. Tell us why.

Mr. FRANCE. I want to object that it is immaterial, incompetent, and irrelevant.

Examiner McKEAG. He may answer subject to objection.

841 A. Because it was necessary to change all the specifications for the War Department in order to secure the supply that they needed. The specifications which were in force when I took charge of the buying for the War Department were so restricted that the competition was limited, as a matter of fact, to one concern and its successors. They had all the War Department's business practically, all the War Department's business in winter underwear for twenty years, and the specifications were so drawn that it made it very difficult for any competitor of that concern to submit samples which would pass the tests which were required, and there were only three or four mills in the country that had the equipment to take care of the business. So the first thing to do was to draw up new specifications, and in drawing up new specifications it was sought to make them so accurate in their language that there could be no

misunderstanding. Previous to that the Army had, as I remember it specifically, called the winter underwear wool underwear, when as a matter of fact it had never contained more than 50 per cent of wool, and the specifications which were in force when the war broke out called the underwear wool, and yet it contained only a third of  
842 wool. So that in drawing the new specification we had an opportunity to revise the nomenclature and it was called wool and cotton.

Q. Had the word "Merino" been used?

A. Not to my knowledge. It is called wool and cotton. If the yarns were made on the woolen yarn spinning process, but in order to—

Q. At what time prior to the change—

A. In the changed specifications—the new specifications—there were four types of underwear divided into two classes of what is known as flat knitted underwear and right knitted underwear, and each of those classes was subdivided into two. One, using woolen yarns or wool spun yarns, and the other, worsted and cotton yarns, combined, and by making those four different types of underwear we were able to throw the business open to every knitting mill in the country that could make underwear. We were careful to call one type wool and cotton, flat knitted underwear. The second type was woolen and cotton ribbed knit underwear, the third was worsted and cotton flat knitted underwear, and the fourth was worsted and cotton ribbed underwear.

Q. You referred to the term wool spun.

A. Yes.

843 Q. As applied to a yarn?

A. That applies only to a yarn.

Q. And what is the peculiarity of the yarn so designated?

A. The yarn so designated is—let me say the stock for the yarn—so designated, is first prepared on woolen cards which separate the wool from some of the impurities in it and prepare it in the form of a roving for the spinning processes, which finally twist it down to the size that is required for the cloth to be knitted.

Q. And in that spinning the wool fiber is combined with cotton in wool spun yarn?

A. It is, for the Army goods.

Q. In the common use of the term?

A. Not necessarily, but let me say that before the Federal Trade Commission took this matter up with the knitting mills there was the greatest carelessness of the use of the words wool and cotton in the trade. All of the underwear mills that made underwear containing any wool made on the woolen system were calling their products wool underwear, and they were called wool underwear mills; no one spoke of them as anything else.

Q. As distinguished from cotton?

A. As distinguished from the cotton people. The great bulk  
844 of all the underwear and all the hosiery contained no wool at all. The Army people used the language of the trade when they used the words wool and woollen in connection with their knit supplies.

Q. What is the object of this special treatment of the fibers that enter into the composition of wool-spun yarn and of the yarn itself?

Mr. FRANCE. I object to this as immaterial, irrelevant and incompetent. We have heard this thing repeatedly from other witnesses. I don't think this record should be cumbered with it.

Examiner McKEAG. It may be received subject to objection.

Q. Has it to do with the final appearance of the yarn?

A. Oh, yes; very much.

Q. And is the purpose to give it a likeness to wool, as the name would indicate?

A. It contains wool and a wool-spun yarn may be all wool, or may be all cotton, or any percentage of combination of the two fibers.

Q. Then as to all of those either all wool or cotton or various percentages of composition, what is the result of the peculiar treatment as to appearance and feel?

845 A. A wool-spun yarn as distinguished from the cotton spinning of yarn or the worsted spinning of wool fibers makes a lofty, soft, spongy yarn, which makes a soft woolly fabric with the fibers sticking out and easily perceived to the touch, whereas the ordinary cotton yarn spinning process makes a hard-twisted yarn which has more the surface of a wire.

Q. Referring to the report of the committee on underwear of the knit goods manufacturers of America, adopted November 12, 1919, of which you testified to the adoption and which is in evidence, I call your attention to the statement here as follows:

"Report of the committee on underwear labeling to the Knit Goods Manufacturers of America.

"We have received complete list of the labels complained of and we have made a wide inquiry among other manufacturers, as well as among retail and wholesale dealers as to the underwear labels in use. We find that all of the descriptive terms complained of by the Federal Trade Commission have been used on the labels for the same underwear for a number of years, in some case for nearly half  
846 a century, and that these products are to-day among the most popular and respected in the country, showing beyond question that these manufacturers have kept their customers through the intrinsic value of their product which the consumer had worn, and not through wordings on labels of boxes usually left in the retail store."

Did you, Mr. Cromwell, prepare this report?

A. I did.

Q. And you have personally examined the labels referred to in that passage?



A. Yes.

Q. And you are familiar with the particular labels referred to as being set out in this complaint against the Winstead Company?

A. Yes; I had a collection of them.

Q. You don't mean to make it appear from that statement which I have read that these particular labels here complained of were used by all manufacturers of underwear?

A. No; they were used by the particular mills who furnished them to me and who have been cited by the commission as practicing unfair methods in trade.

Q. So that this statement I have read relates to the labels  
847 of the particular mill?

A. As to those particular mills; yes.

Q. You know as a fact, do you not, that various manufacturers of underwear use no descriptive labels?

A. Some use no descriptive; yes.

Q. And that some use what perhaps might be termed a middle class of labels that have some other words than the mere trade name, but nothing relating to the contents?

A. Meaning wool or cotton?

Q. Yes, the fiber, is that in our medium class?

A. No rule. There was a great variety.

Q. But some have excluded these descriptive terms?

A. A few did; and a good many put no emphasis on them at all. They were in very small type. They were sometimes stamped in.

Q. Subordinated?

A. Absolutely. You would have to look for it.

Q. Isn't it a fact that some of the large producers of underwear have never, to your knowledge, used descriptive labels; for instance, the Reis, and Munsinger, and Wright, for instance?

A. I think that is so, but I couldn't be sure because—I have seen a good many of their labels——

Q. I quote from this same report of the Knit Goods Manufacturers of America, November 12, as follows:

A. I don't remember, Mr. Clark, that any of those three concerns you mentioned were complained about.

Q. No; they were not.

A. I think not.

848 Mr. CLARK. I quote this:

"It is fair to suppose that the public will assume that any word label—dictionaries."

Q. In your previous testimony I think you expressed the opinion that you didn't know what the public's understanding of these particular labels was, is that right?

A. You are right. But I think it is fair to assume that if they attach any meaning to those words they would attach the meaning given in a standard dictionary.

Q. Now, if it appears that the Standard Dictionary, the Century Dictionary, and the American University's Unabridged Dictionary



define the word "merino" without including in that definition mixed cotton and wool fabrics; and Webster's New International Dictionary gives this definition under the word merino: Adjective, 1; designating, or pertaining to, a breed of fine woolled white sheep originating in Spain and afterwards widely popular, especially in America and Australia. The males have heavy spirally twisted horns; the ewes are hornless. In the better varieties the skin hangs in heavy folds, especially above the breast, shoulders, and thighs. The brood  
 849 excels all others in the weight and quality of its fleece, but does not run high as a mutton producer.

"2. Made of merino."

Also from Webster's dictionary:

"Merino, noun.

"1. Merino sheep.

"2. Fine fabric made originally of merino wool, but later a fine wool mixed with cotton.

"3. A fine woolen yarn used in hosiery, underwear, etc."

I ask you, in view of my statement assuming that to be correct as to the absence of any reference to the application of this word to mixed wool and cotton fabrics in three dictionaries that I have named, and these definitions from Webster's, have you an opinion now on the basis of the public minds being influenced by dictionary definitions as to the public understanding of this term?

MR. FRANCE. I object to this as immaterial, irrelevant, and incompetent; as an attempt to impeach a report which was filed by the trade commission on its own case, and an endeavor to impeach the opinion as expressed by its witness in that report and hitherto on the stand, the witness having been produced by the Federal Trade Commission.

Examiner McKEAG. He may answer, subject to the objection.

850 A. I don't quite understand.

(The question was then read as above recorded.)

Q. Is that intelligible?

A. I will try to answer your question directly.

Before preparing the report I looked the matter up in the dictionary for the first time in my life. I thought I knew what those words meant, but I wanted to see what a man who was criticising a label, or felt that he had taken home a box of underwear that had a label on it which described qualities which the contents did not possess could base an opinion upon. I found in several dictionaries that in very fine print as a subsidiary meaning that the word "merino" had in practice come to cover a fabric that had a percentage of cotton in it which was originally put in because the merino wool was so fine and so subject to shrinking in washing that the cotton was put in to counterbalance.

Q. Did the dictionary say that?

A. No; it had finally come to cover that.

Q. Did you say you found that in several dictionaries? Name them.

A. I can not name them off hand, but my impression is that it was in the Standard dictionary. I looked up a number of dic-  
851 tionaries.

Q. You can not say the Standard, can you?

A. I can not say, but in two of them it said it did cover a fabric containing a mixture of cotton and, I think, it said a small per-  
centage—

Q. Do you recall what two?

A. No; I can not. I had them before me and I was quite careful in preparing the report.

Q. I note in the report that the term "natural merino" is put in the third column under the head improperly labeled words.

A. That is because of the word natural not of the merino.

Q. How, in your mind, did the word natural aggravate the meaning of the term merino as far as its changed application goes?

Mr. FRANCE. I object on the same grounds.

Examiner McKEAG. He may answer subject to objection.

A. My whole understanding or attitude to some of these definitions was very much—

Q. I wish you would answer my question.

Answer. I am going to try to tell you. You ask about the word "natural," and I think not only to me but everybody in the  
852 industry it had been an entirely innocent term, which meant nothing but a color. It was called "natural" wool color and it had an historical origin that stockings and underwear made in this country were scarlet—that was the underwear which was scarlet underwear—scarlet and white were the two kinds of underwear that were made in the early days of the knitting industry in his country. And the underwear that was imported was partly scarlet and white. Then they began to bring over gray underwear and that gray underwear was made of a natural color; black wool which was carded in with a large percentage of white wool, and, perhaps, with some cotton, and it was called natural colored to distinguish it from the dyed scarlet underwear. So that the word natural came innocently and naturally upon these labels and the whole trade accepted it as natural wool underwear.

Q. Why was it more subject to condemnation than the word "Merino" alone?

A. Because I found two of the commissioners told me that they thought it was the trickiest and most offensive of the whole category. One of them, Mr. Thompson, told me that that was the one that made  
853 him maddest of all, and Mr. Murdock said the same thing. That to him to call a thing natural wool when it was not all wool was not right.

Q. You were impressed by that?

A. Yes. Previously the trade point of view was the one I went on. When I woke up to the fact they had gone so far as to put the words "Natural wool" on the labels of all cotton underwear.

Q. Mr. Cromwell, in your testimony you expressed an opinion as to the proportion of all wool underwear of domestic manufacture compared to other underwear?

A. Yes.

Q. Was that comparison as to the whole product of underwear including cotton underwear as well as mixed?

A. Oh, yes.

Q. Now, will you estimate the proportion of all-wool underwear—domestic manufacture—to the combined mixed and all wool?

A. The nearest estimate I can make is that less than ten per cent of the winter underwear which is manufactured in this country contains any wool at all. I think that last—

Q. I am speaking of what does contain all wool.

A. I am coming to that. I think that to say that one-twentieth of the underwear containing some wool and some cotton, that  
854 one-twentieth of that class of underwear is made of all wool is a very liberal estimate.

Q. That is your opinion?

A. Yes. In other words, I think that less than one-half of one per cent of all-wool underwear is made.

Q. Including cotton?

A. Yes.

Q. About five per cent of the all wool and mixed?

A. I think that is a liberal estimate, and would be made up very largely of infants' underwear.

Cross-examination by Mr. FRANCE:

Q. First, I would like to read in subject to correction a definition found in Murray's New English Dictionary.

Mr. CLARK. I would like to have it appear that it is English, as distinguished from American.

Mr. FRANCE. It is an English publication.

"Merino, a soft woolen material resembling but finer than French cashmere; originally manufactured of merino wool, but later of a fine wool mixed with cotton. (Citing 1869 et al. Parks' Practical Hygiene, page 405. 'In merino and other fabrics, if cotton is used as wool.'")

855 I want to know, Mr. Cromwell, whether you went in your examination—whether you examined Murray's New English Dictionary?

A. No, sir; no.

Q. This respondent in this proceeding, the Winsted Hosiery Company, was not in your mind when you were talking about concerns which had manufactured all cotton and labeled it natural wool?

A. They were not.

Q. And your opinion of Winsted is just as it was when you testified the other day?

A. Entirely so.

Q. When you prepared in collaboration with other members of the committee this report of November 12, 1919, you had before you the labels of the Winsted Hosiery Company which were in question, as well as the labels of the other respondent?

A. Yes; my recollection is we had them all.

Q. One more question. From your experience with the manufacturers of underwear in the preparation of their reports to the Census Bureau for the census of 1914, in your opinion, do you think  
856 manufacturers in general under the heading of wool only tabulated all-wool garments?

A. I have no experience with the census of 1914. I was in charge of the census that was made for the War Industries Board in 1918. We sent out a preliminary questionnaire and were astonished to find that mills which we knew had never made a garment of all wool in their lives were reporting an enormous product of wool underwear.

Mr. CLARK. I object to that as having no basis and ask that it be stricken out.

Mr. FRANCE. Well—

Examiner McKEAG. Your motion will be reserved.

A. That was before the Federal Trade Commission had called this to any one's attention. It was common to call it a wool mill as distinguished from the cotton underwear mills, and we called it commonly wool underwear in the trade.

Mr. CLARK. Mr. Cromwell, you have had personal and long experience in the supervision of the manufacture of underwear?

The WITNESS. Yes; 30 years.

Mr. CLARK. Or with what companies doing business under what name?

The WITNESS. All my business life with the Root Manufacturing Co. of Cohoes.

857 Mr. CLARK. The Root Manufacturing Co. was one of the houses whose labels were complained of by the commission?

The WITNESS. Yes, they caused great indignation and astonishment.

Mr. CLARK. What were they?

The WITNESS. Those labels?

Mr. CLARK. I ask you to name them.

The WITNESS. Australian wool, Persian wool, Saxony wool, natural wool.

Mr. CLARK. Scotch wool?

The WITNESS. I think not. Persian wool—Persian fleece.

Mr. CLARK. Did the Root Co. use the label Scotch wool?

The WITNESS. I don't think so. It used a good many words of that kind. It might have been among them, but I think not.

Mr. CLARK. Can you state what percentage of wool—

Mr. FRANCE. I object to this as immaterial, irrelevant and incompetent and has nothing to do with the Winsted Hosiery Co.

Examiner McKEAG. He may answer subject to objection.

A. I don't think more than 40 per cent of wool in the highest content.

858 Mr. CLARK. How little in that containing the least?

The WITNESS. Possibly 20 per cent.

Mr. CLARK. Did not some contain only 5 per cent?

The WITNESS. No.

(Witness excused.)

Mr. CLARK. It is stipulated that the following, appearing on page 600 may be cancelled—stricken from the record—expunged from the record, as follows:

"On October 28th at the Hotel Ten Eyck in Albany, representatives of practically every woolen underwear manufacturer met under the auspices of the knit goods manufacturers of America, a resolution was adopted as follows."

I now offer in evidence this, which was marked yesterday "Commission's Exhibit No. 12."

Mr. FRANCE. I object to its admission in evidence. The partner of that concern was on the stand yesterday, and this letter is incompetent.

Mr. CLARK. He identified this as a letter written by his partner.

Examiner McKEAG. The paper marked "Commission's Exhibit No. 12" is accepted subject to counsel for respondent's objection.

859 (Commission's Exhibit No. 12 was then received in evidence.)

A. T. SKERRY was thereupon called as a witness, and having been duly sworn testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Skerry?

A. Spinner of worsted yarns.

Q. Where is your factory?

A. One at Millville, Pa., and one at Changewater, N. J.

Q. Are you connected with an organization of woolen spinners?

A. I am vice president of the National Association of Worsted & Woolen Spinners.

Q. And how large an organization is that?

A. It takes in about 80 per cent of the spinners of the country.

Q. Speaking of your own business, do you spin all-wool yarns?

A. All worsted yarns.

Q. That is also a wool, is it not?

A. Yes.

Q. The distinction between all wool and all worsted yarns is what, please?

860 A. Well, they are an entirely different system of spinning known as the wool system and the worsted. In a woolen yarn we do not take out any of the short stock that is in the wool and in that system we can also use shoddy or noils and cotton and so forth and it goes through very few processes to produce a yarn—a worsted

yarn has all the short stock taken out of it and every fiber is made parallel and on the Bradford system of spinning, which is my system, we can not use cotton of any kind, it must be an absolutely all-wool yarn.

Q. All worsted?

A. Yes. There are two systems of woolen yarns—what is known as the French-Belgian system and the Bradford system. Now, I take it that what you have in mind is more connected with the French system of worsted spinning, in which they can use cotton as well as wool, because the French system admits of the use of the short stock both in wool and in cotton.

Q. Well, now, as to the materials which you use in your own business.

A. Nothing but absolutely pure wool.

Q. Of a fine quality?

A. Not necessarily.

861 Q. How are the different grades or qualities of wool known to the spinning trade?

A. Well, they go in two ways; they go either by name or by number.

Q. Confine yourself to the classification by names; what are the terms?

A. Carpet wools, quarter-blood, three-eighths, half-blood, and merino, the merino being the finest grade of pure-blood sheep.

Q. And to what blood does the fractional blood refer?

A. I don't just understand.

Q. You say quarter-blood, three-eighths blood, and so forth.

A. A quarter-blood is a coarse—fairly coarse wool; a three-eighths blood is about fifty per cent finer than that, and then we have half-blood which is a fine wool.

Q. Is the merino wool the standard?

A. Well, we have no standard, because you get—each grade is a standard in itself.

Q. I didn't know but that merino being the finest, that the fractions represented only the percentage of merino?

A. No; the numbers perhaps would help you a little bit, when they start, perhaps, from 30's running to 40's and finally up to 862 70's, which would be the merino wool.

Q. Do you buy any merino wool?

A. No; I do not.

Q. Do you buy any wool?

A. Yes; I don't comb anything finer than three-eighths wool.

Q. Which commands the highest price—which wool?

A. The merinos, on the scoured basis, everything is on a scoured basis.

Q. Do you understand the flocks of merino sheep exist to-day?

A. In the country; yes; in the northwest country, the territory.

Q. Merino wool being the fleece of the merino sheep, can be bought in the wool market?

A. Yes.

Q. Are you familiar with the term "wool-spun" as applied to yarns?

A. Yes.

Q. Will you describe the peculiarity of that yarn as to the process and the result?

A. I did in my first question, but I will give it to you again.

Q. Is that applied sometimes to yarns made of wool and cotton as well as wool?

863 A. Why, yes.

Q. In short, is the purpose or the result to give the yarns composed partly of cotton the appearance of wool?

A. It depends upon two things, as to whether they are trying to produce something as cheap as possible, or trying to produce something that has a value by having the cotton in it.

Q. What does the term "Wool-spun" as applied to the manufacture of yarn represent particularly in the French system?

A. The term "Wool-spun" would not be any indication as to whether or not there was any cotton in it. It would simply mean that it was spun on the wool system and not on the worsted system.

Q. And does that wool system, whether applied to a fibre alone or to a mixture of wool and cotton give the result of a wool in its state as distinguished from worsted?

A. That would depend on the amount of cotton that is in it, I should say.

Q. What is just the process—does it consist solely of carding, which produces wool-spun yarn?

A. The wool-spun yarn is first carded directly from the card and is slivered, which is put on mule, or jack and that is in one operation put into yarns by drawing out and twisting. Now, in our  
864 worsted system we go through sixteen operations to produce that same thing. The wool system admits of the use of short wool—the worsted system does not.

Q. Have you any observation of the understanding by the public of the term "Merino" as applied to underwear which you think warrants you to express an opinion as to the proper understanding of that term?

A. I think that the public—

Mr. MOLLOY. I object to the answer of this witness, as he has not been qualified.

Mr. CLARK. I will change that.

Q. I understand a merino fabric would be a percentage of wool and a percentage of cotton.

A. Well—

Q. What in your mind does the term "Merino" mean primarily aside from underwear or any other article?

A. As a wool buyer merino means but one thing—the very finest of wool—all wool.

Q. And when you say that as applied to underwear it means a garment made of a percentage of wool and a percentage of cotton.



Does not the result of your acquaintance with the trade use of that term influence your answer?

A. Yes. There is no pure merino wool underwear made.  
865 You couldn't launder it but once and wear it. It would not be practical.

Q. But there is all wool?

A. All wool.

Q. Are you acquainted with some of the manufacturers in this country of all-wool underwear?

A. Yes; with the Wright health underwear people only.

Q. You sell some all wool and worsted yarns, do you not?

A. I sell worsted yarns; no wool.

Q. Now, these worsted yarns are all wool.

A. They are all wool.

Q. Do you make any other yarns?

A. That would not be of interest to you; we make mohair and other articles, but not in this line.

Q. You don't know how much of your worsted yarns go into underwear?

A. I don't think any of our yarns go into underwear.

Cross-examination by Mr. MALLOY:

Q. Your yarns go more into the clothing trade?

A. Mostly into the dress goods, men's wear, and sweaters.

Q. You have described certain yarns called half-blood and  
866 three-quarters blood and merino, and am I to understand that the terms so used are to indicate the grade of the yarn?

A. Yes; grade of the wool in the yarn.

Q. And using the word "merino" as a grade, that does not necessarily indicate that it is a wool, that it is the wool of the merino sheep?

A. In describing the yarns?

Q. Yes.

A. As part of the yarn, no; it does not. The term "merino"—

Q. It is purely a description of the highest grade of wool yarn?

A. The term "merino" as applied to yarn would indicate that it is a percentage of cotton and wool.

Q. Is it not a fact that in the making of worsted yarns cotton is used in the making of a worsted yarn?

A. On the French system; yes.

Q. So that there is bought and sold—manufactured and sold—in the trade, a yarn known as worsted yarn that has a percentage of cotton in it?

A. Yes.

(Witness excused.)

867 Mr. CLARK. The case for the commission is closed, with the exception of the following matters:

The transaction mentioned to counsel for respondent relating to the sale by Goldenberg of Washington of alleged Winstead garments in 1917, with evidence of analysis by the Federal Bureau of Stand-



ards; the evidence, in the form of an affidavit or a written statement by W. W. Burch, of Chicago, as relating to the extent of the merino breed of sheep in this country, and so forth, to-day; and third, the evidence of C. L. Mitchell, of Waterford, N. Y., a manufacturer of underwear, respecting his process and labels. While it appears that the evidence which the commission desires to introduce as to the Goldenberg transaction may be permitted without objection by counsel for the respondent and pending his investigation on that point, this evidence is held in reserve. The evidence of W. W. Burch will be submitted as soon as received by counsel for the commission to the respondent's counsel with a view to its stipulation into the record; in the event that Mr. Mitchell, who has been subpoenaed by the commission for 2 p. m., December 17th, does not respond, a stipulation covering the proposed evidence on his part will be submitted to counsel for respondent. If any evidence on the three matters named above, in the form of testimony, is desired by respondent, after  
 868 the submission of the proposed stipulations, a day will be agreed upon as early as possible to take such testimony and complete the commission's case. This should not occupy more than part of a day. I ask counsel for the respondent, in view of this, to regard the commission's case as closed, so far as affects the presentation of respondent's case, in view of the limited time in which all the evidence in this matter must be presented to the court.

Mr. MOLLOY. In view of statement of counsel for the commission, counsel for the respondent is not prepared to proceed with the defense in this proceeding until there is an unqualified closing on the part of the commission. We will be prepared to state our intention of proceeding with the defense just as soon as the three matters referred to by counsel for the commission have been disposed of.

(Whereupon an adjournment was taken until 2 o'clock p. m.)

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## AFTER RECESS.

CHARLES L. MITCHELL was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. What is your business, Mr. Mitchell?

A. Manufacturer of knit underwear.

Q. What is the name of your company?

A. Waterford Knitting Company.

Q. How long have you been in that business?

A. Since 1888 or 1889.

Q. Have you manufactured all-wool underwear?

A. We have.

Q. For how many years?

A. During that period; not every year, but intermittently.

Q. And can you state, approximately, the proportion of your all-wool output to your entire output of knit underwear?

A. Oh, I think it runs from twenty to twenty-seven or eight per cent—somewhere in that neighborhood.

Q. And can you state the amount of the all-wool product in 870 the average annual amount of dozens, approximately?

A. No; I would not be able to do that without referring to the records.

Q. I show you this memorandum [handing witness paper], which includes a statement of what purports to be a statement of the amount of your output of all-wool garments, in dozens, and ask you if you recall from that statement whether or not the figures there are correct?

A. The figures were taken from our records.

Q. Will you please, then, state from those figures what the amount is?

A. The orders taken in 1913 were 28,800 dozens, that was the original orders, and of those 6,720 dozens were all wool. 1914, total initial orders 25,920 and 4,800 all wool; 1920, 31,500 and all wool 9,200. Those figures are in round numbers; they are not absolutely number of dozens.

Q. During those years which those figures relate to, what labels were the all-wool garments put out under?

A. Put out under wool, all the scarlet shirts were labeled, except 1920.

Q. Did you manufacture underwear also made of cotton and 871 wool?

A. Yes, sir.

Q. Did you put out some of your products under labels requested by customers?

A. We did.

Q. Can you state as to the customers' labels on your output whether some of them included the terms of description of the wool and cotton composition and whether some of the customers' labels had not descriptive terms?

A. Why, to the best of my recollection the labels prior to the notice from the Federal Commission all had some sort of descriptive term. Since that time we have refused to use labels with descriptive terms.

Cross-examination by Mr. FRANCE:

Q. Mr. Mitchell, I understood you to say that you labeled your all-wool shirts wool and then said our scarlet shirts. Did I get that right?

A. The wool shirts are scarlet shirts.

Q. In other words, they are red shirts?

A. They are red shirts.

Q. And the wool, all-wool garments, shirts, which you have 872 made are all red?

A. All red, all scarlet.

Q. And the other garments that you have turned out which are a mixture of cotton and wool, are the gray materials?

A. The gray shirts.

Q. Do you know whether or not there is an opinion, an idea, held by the jobbing trade in your industry that only an all-wool garment will take a scarlet dye?

A. No; I don't.

Q. Prior to the word of the Federal Trade Commission that certain labels should not be used, you had, in your business, like other manufacturers, employed many of the terms that had been so condemned by the Trade Commission?

A. We certainly did.

Q. In the knit goods industry, among the manufacturers, the jobbers, and the persons who purchased from you as a manufacturer, there never had been any question whatsoever about those terms, had there?

A. No, sir.

Q. And when the Trade Commission spoke, why, you heard and you obeyed?

A. Absolutely right.

873 Redirect examination by Mr. CLARK:

Q. You have referred to some sort of a notice from the Federal Trade Commission, Mr. Mitchell, is it your recollection that that was in the form of a letter to the effect that the commission had had its attention called to the alleged fact that you were using certain labels containing descriptive terms on your underwear?

Mr. FRANCE. I object, because I think the best evidence of this is either a copy from your files of the notice that was sent, or the original letter to Mr. Mitchell.

Examiner McKEAG. He may answer subject to objection.

(The question was then read as above recorded.)

Q. And implying the fact as to what you had used?

A. It was a letter, asking, if I remember correctly, if we were using labels, calling our attention to the wording of labels, and I don't remember the form of the letter, but it was written in such a way that it led us immediately to discard all the labels that we were using with a descriptive term; we dropped the word wool entirely.

Q. And that action by you was on the theory that it might  
874 come under the criticism which this letter referred to?

Mr. FRANCE. I object to that as leading.

Examiner McKEAG. The commission entered no formal order against your company?

The WITNESS. No, sir.

Q. This letter was not in the form of a direction that you should cease to use—

Mr. FRANCE. I am going to object, because the best evidence of what that letter is or is not, is the letter itself.

Examiner McKEAG. I don't think it is material.

Mr. CLARK. I only want to bring out what he has intimated when he speaks of getting a letter from the commission.

Mr. FRANCE. The impression which you got from the letter was that if you did not discontinue the use of the labels to which your attention had been called that proceedings would be instituted against your concern?

The WITNESS. Yes, sir.

(Witness excused.)

(Whereupon at 2.30 o'clock p. m. on December 17th, 1920, adjournment was taken, subject to notice.)

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Before the Federal Trade Commission.

FEDERAL TRADE COMMISSION, COMPLAINANT, }

vs. }

WINSTEAD HOSIERY COMPANY, RESPONDENT. }

Docket No. 214.

NEW YORK, N. Y., *December 23, 1920.*

Met pursuant to adjournment.

Appearances same as before.

C. E. LA VIGNE was called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. What is your name and address?

A. C. E. La Vigne, 1349 Meridian Place NW., Washington, D. C.

By Mr. CLARK:

Q. Where were you employed in November, 1917?

A. American Fair Trade League.

Q. Where is their headquarters?

878 A. Fifth Avenue Building, New York City.

Q. Have they a branch in Washington?

A. They had an office in Washington.

(A paper was then marked "Commission's Exhibit No. 31" for identification.)

Mr. CLARK. I offer it in evidence.

Mr. MOLLOY. I object to its being introduced in evidence on the ground that it is incompetent and irrelevant and immaterial, not binding upon this defendant, no evidence to show that it is authorized, or that the defendant had anything to do with the advertisement of which this purports to be a copy.

Examiner McKEAG. You raise no point on the authenticity?

Mr. MOLLOY. No, no.

Examiner McKEAG. The exhibit may be received in evidence subject to objection of counsel for the respondent.

(The paper previously marked "Commission's Exhibit No. 31 for identification" was thereupon received in evidence, marked "Commission's Exhibit No. 31," and is forwarded herewith.)

Q. I show you Exhibit No. 31, and ask you to read part of the advertisement there, stating whose advertisement it purports to be.

A. This is the Evening Star, Friday, November 23, 1917, an advertisement of Goldenberg's department store, in Washington, D. C. Practically a page advertisement, part of which reads as follows:—

Mr. MOLLOY. Just one moment. The advertisement is in evidence. I should not think it is necessary for the witness to read it.

The WITNESS (continuing). "Men's Winstead Mills underwear; medium-weight Australian wool; shirts and drawers to match. All sizes up to 50. Regular \$2 values, \$1.35."

Q. What is the date of that advertisement?

A. November 23, 1917.

Q. Did you, subsequent to the appearance of that advertisement, go to the Goldenberg's store for the purpose of purchasing a garment so advertised?

A. Yes, sir; on November 24, I believe.

Q. Will you state what occurred at that visit to Goldenberg's store?

Mr. MOLLOY. I object to this line of testimony as being hearsay, irrelevant, and not binding upon this defendant.

Examiner McKEAG. He may answer, subject to the objection.

The WITNESS. With this particular advertisement, I went to the Goldenberg store, being directed to the underwear counter  
880 asked the clerk for the garment advertised here. He took from the shelf a box containing underwear, and upon his assurance—

Examiner McKEAG. Not his assurance; tell what he said.

The WITNESS. He said, in response to my question, is this the underwear advertised as Winstead Mills underwear? "Yes, it is Winstead Mills underwear." I purchased the garment.

Q. It was a shirt?

A. Yes.

Q. Did you make a memorandum soon after your visit to the store?

A. I made a memorandum, yes sir, immediately.

Q. Is this it?

A. Yes, sir; I also made a tag attached to the garment, the garment itself being also marked for identification by the witness who was with me when I made the purchase.

Q. Is that the tag to which you refer?

A. Yes, sir; that is my handwriting.

Q. Having referred to those memoranda, will you state whether or not the garment you purchased was marked Winstead?

A. I bought a shirt labeled Winstead, size 42, price paid \$1.35, as advertised.

Q. Can you state what the label on the box there from which the shirt was taken was?

881 A. To the best of my recollection, Winstead Hosiery Company.

Q. Was there any label there on the garment or on the container indicating the quality as to the wool?

A. No, sir.

Q. Was any representation made to you at the time the garment was sold to you as to its quality?

A. I asked for the garment advertised Australian wool. It was sold to me represented as Australian wool, Winstead make. In other words, the garment as advertised—

Mr. MALLOY. One moment. You have already answered.

Q. You don't recall any label on the box?

A. I do not.

Q. State what you did, if anything, with the garment after you had purchased it?

A. It was taken by me personally to the United States Bureau of Standards for test.

Q. And did you receive a report subsequently from the United States Bureau of Standards?

A. Yes, sir.

By Examiner McKEAG:

Q. Did I understand you to say that on the garment was a label, sewed on it, Winstead?

A. Yes, sir.

882 (A paper was thereupon marked "Commission's Exhibit 32" for identification.)

Q. I show you commission's Exhibit 32 and ask you if that is the report received by you from the Bureau of Standards?

A. Yes, sir.

Mr. CLARK. I offer this in evidence.

Mr. MOLLOY. We object to the introduction of it in evidence on the ground that it is incompetent, irrelevant, and immaterial and not binding upon this defendant.

Examiner McKEAG. No point being made as to the authenticity or the connecting up?

Mr. MOLLOY. There is no objection to the competency.

Mr. CLARK. Have it clear. Do you admit that this letter, Exhibit 32, and particularly the paragraph as follows—

Mr. MOLLOY. No; take it all or none.

Mr. CLARK. And particularly this portion of it: "1. The sample marked 'Undershirt, size 42; label, Winstead Hosiery Company, advertised and sold as medium-weight Australian wool,' was found to be 90 per cent cotton and 10 per cent wool" refers to the garment stated by Mr. La Vigne to have been submitted?

Mr. MOLLOY: Yes.

Examiner McKEAG. Exhibit No. 32 may be received in evidence subject to counsel's objection.

Mr. MOLLOY. And the admission does not waive the objection to its introduction.

(Whereupon the paper previously marked "Commission's Exhibit No. 32 for identification" was marked "Commission's Exhibit No. 32" and was received in evidence and is forwarded herewith.)

Mr. CLARK. I think that is all, Mr. La Vigne.

Cross-examination by Mr. MOLLOY:

Q. I ask you, Mr. Witness, to let me look at the memorandum from which you refresh your recollection while testifying. [Paper handed Mr. Molloy.] In submitting the samples to the Bureau of Standards, which you have stated were the samples marked undershirt, size 42, labeled Winstead Hosiery Company, advertised and sold as medium-weight Australian wool, you meant that the Goldenbergs had so advertised in the advertisement which has been introduced in evidence, and their salesman so stated to you that the garment which they sold was the garment as advertised?

A. Yes, sir.

Q. There was no representations made by the Winstead Hosiery Company in that advertisement, or at the store at the time  
884 you purchased this garment?

A. No, sir.

Q. When you prepared your memorandum, this matter was fresh in your mind, was it not?

A. Yes, sir.

Q. And it is fair to assume that you would have jotted down anything that was of importance to the matter which you then investigated in your memoranda?

A. Yes, sir.

Q. I notice you jotted down on your memorandum that the article was labeled on the garment itself as Winstead Hosiery Company. The garment had a label in the collar of the shirt, I presume, of the Winstead Hosiery Company?

A. A label of the Winstead Company. I wish to set you absolutely clear in answer to that. It may have been Winstead, it may have been Winstead Hosiery Company. That was two and a half years ago. According to the memorandum which you have immediately before you, it is labeled Winstead. That was the material part of the label, at least.

Q. You do not know whether the label designated Winstead is a label used by the Winstead Hosiery Company or not?

A. Yes, sir.

885 Q. I say you do not know?

A. I do.

Q. How do you know it?

A. Because either on the box or on some of the labels which were before me during the purchase and during the conversation with the clerk Winstead Hosiery Company was used.

Q. So Winstead Hosiery Company's name was on the box?

A. I, to the best of my recollection, would say so.

Q. Mr. La Vigne, how long have you been in the employ of the American Fair Trade League?

A. I was with the American Fair Trade League, I believe, about two years.

Q. At that time?

A. This was a part of the two-year service.

Q. Are you employed by them now?

A. No, sir.

Q. When did you leave their employment?

A. In the month of, well,—approximately the month of September, 1918.

Q. Will you state what position did you occupy with the league at the time of the purchase of this garment?

A. Field representative.

Q. And state what your duties were in that position.

886 A. Do you really want the whole story?

Q. Well, in a few words, tell us what you were doing on behalf of the league about November, 1917.

A. In or about November, 1917?

Q. That was the date when these purchases were made?

A. In or about November, 1917, I was engaged in, well, practically as prosecuting witness in many instances in various parts of the country against fraudulent advertising. That was not the original work I undertook to do for the American Fair Trade League.

Q. What is your Fair Trade League, an association?

A. Yes, sir.

Q. Incorporated?

A. I am not certain whether it is incorporated or unincorporated. I have never inquired as to that. The secretary can give you the information. My judgment is that it is unincorporated.

Q. Do you know the source of revenue that the league receives that supports the league in its activities?

A. I am not familiar with that.

Q. What was the occasion of your attention being drawn to the advertisement shown in Exhibit 31?

887 A. Which is Exhibit 31?

Q. The one you read and are testifying to.

Examiner McKEAG. Goldenberg's ad.

A. The matter of Australian wool and natural wool.

Q. You knew, did you not, Mr. La Vigne, when you saw the advertisement at that time of a garment purporting to be an Australian wool garment for that price, that there was something wrong about it. Did that occur to you?

A. Why, true.

Q. So that you went to the store knowing that there was something wrong about the article advertised?

A. No; I would not say that, sir.

Q. When you saw the salesman, did you inquire whether the garment was all Australian wool?



A. I did not use that language.

Q. What were the exact words?

A. I asked for the article advertised in the newspaper as Australian wool. And then when the article was shown to me I asked is this the Australian wool article advertised. That is all. Tied it direct to the advertisement—looked for the article advertised, that is all.

Q. During the course of your association with the American Fair Trade League have you had any occasion to make similar investigations concerning trade mark merchandise?

A. Well, not of this nature.

Q. At any time have you made any investigation of trade-mark underwear?

A. No, sir; not that I recall.

Q. Who is the president of your association, the league, or who was the president in 1917?

A. I believe Charles H. Ingersoll.

Q. Do you recall who the directors were?

A. I do not.

Q. After the Goldenberg proceeding, did you have occasion to take up this question with the Federal Trade Commission, or was it Mr. Wittier who brought it to the attention of the Federal Trade Commission?

A. In my present position as examiner of the Federal Trade Commission, I don't believe I am at liberty to answer that.

Q. I insist that you answer. Do you know who brought this matter to the attention of the Federal Trade Commission?

Examiner McKEAG. He merely asked you who did; he did not ask you for any confidential information.

A. My answer to that is that, as I understand it, the complainants in all matters before the Federal Trade Commission are not revealed.

Q. I ask you whether you know who brought this matter to the Federal Trade Commission's attention. I want a yes or no answer.

A. Yes.

Q. Who was it?

The WITNESS. I am perfectly willing to answer, Mr. Examiner, if I am privileged so to do. I am at the present time employed by the Federal Trade Commission, and this is just a question—

Q. This happened before you became associated with the Federal Trade Commission, did it not?

A. Why, true.

Q. All the information I am seeking was obtained by you before you became associated with the Federal Trade Commission.

A. I would be glad to answer if I have a right to.

Q. Just answer whether or not the information I am asking for was obtained prior to the day you went with the Federal Trade Commission?

A. Certainly.

Q. And the information concerning it was obtained before then?

890 A. Quite true.

Q. Therefore, the knowledge was present in your mind before that time, was it not?

A. Yes.

Q. Then I ask who it was that brought this matter to the attention of the Federal Trade Commission.

A. I want to answer, but I doubt whether I have the right to.

Examiner McKEAG. In view of the fact, Mr. Witness, that the information came to you prior to the time you were connected with the Federal Trade Commission, and you knew it at that time, it seems to me this is not confidential information under the statute.

Mr. CLARK. The information he requested is who transmitted that information to the commission.

Examiner McKEAG. He said he knew who submitted the information to the commission before he became an examiner for the commission, therefore it could not have been confidential information at that time, and the mere fact that he afterwards became an employee of the commission would not render any information he might have had prior to that time confidential.

Mr. CLARK. I suppose it might be regarded as a breach of the  
891 confidence of the commission, but it is of no materiality to me, but there is a rule of the commission as to the name of the applicant being confidential. Now can an outsider be free to divulge that information?

The WITNESS. May I be permitted to say this—

Mr. MOLLOY. I want an answer to my question. I don't want any argument with you. As I understand it, the examiner has ruled that the witness answer the question.

Examiner McKEAG. That is my interpretation of the law, that only confidential information shall not be disclosed, and this being in the witness's mind and knowledge before he was in a position to acquire confidential information, therefore I can not rule that the information is confidential to him.

Mr. MOLLOY. Will you read my question, Mr. Stenographer?

(Question read as follows: Q. Then I ask, who was it that brought this matter to the attention of the Federal Trade Commission?)

The WITNESS. The ruling of the commission was the same at that time as it is at this moment.

Mr. MOLLOY. I object to the witness arguing the point. I want an answer from the witness.

The WITNESS. I would be very glad to answer. The Federal Trade Commission can answer that for me while I am in its  
892 employ. I have no hesitancy about answering it. If you will get the authority or permission of the commission, I will gladly answer it.

Mr. MOLLOY. The commission here is in charge of the conduct of this proceeding, and it is for the examiner to pass upon a question of that kind, and he is well capable of doing it. He has directed you to answer it, and if you do not, I will ask him to certify your failure to do so, and have you cited for contempt.

Examiner McKEAG. As I have already indicated, Mr. La Vigne, any information of this nature that you obtained prior to your employment as examiner by the Federal Trade Commission should be disclosed at the request of counsel. But not any information that you have obtained since your employment by the commission.

The WITNESS. Then the rule of the commission is not good?

Examiner McKEAG. The rule is still in full force and effect.

The WITNESS. I supplied that information to the Federal Trade Commission personally.

Q. And it was upon your presenting that matter to the Federal Trade Commission that the proceeding was subsequently instituted against the Winstead Hosiery Company?

893 A. I know nothing further.

Q. When was it you supplied this information to the commission, Mr. Witness?

A. Well, that was some little time subsequently, possibly.

Q. It was the fall of the year, was it not?

A. I can not be very accurate on that. It was so long ago I should think a few months, it might have been only a few weeks I should rather say, a few months afterwards.

Q. Was it not a few months before the matter came up when the proceeding was commenced prosecuting Goldenberg?

A. Proceeding?

Q. There was a prosecution against Goldenberg was there not?

A. Yes, sir.

Q. And when did that come up? How long after you made the purchase was a proceeding commenced against Goldenberg?

A. Well, according to my best recollection, quite soon.

Q. And that hung in the courts for some little time?

A. Some little time, and then—

Q. And then you referred the matter to the Federal Trade Commission?

A. Yes.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

894 EDGAR R. CLARK was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct examination by Examiner McKEAG:

Q. What is your name and address?

A. Edgar R. Clark; address, 201 Depew Street, Peekskill, N. Y.

By Mr. CLARK:

Q. Where were you employed in November, 1917?

A. United States Bureau of Standards.

Q. In what capacity?

A. Textile chemist.

Q. You have heard Mr. La Vigne's testimony?

A. Yes, sir.

Q. Do you recall receiving, while you were acting in the Bureau of Standards, a garment such as he has described for analysis?

A. I do.

Q. Did you receive a garment about November 24, 1917, being an undershirt, man's undershirt, for analysis, bearing marks by which you identified it as the one which Mr. La Vigne has described?

A. Yes.

895 Q. Do you remember the analysis of it?

A. I do.

Q. State how you analyzed it.

A. By the customary method of chemical analysis.

Q. Did you take a sample from the garment for that purpose?

A. I did.

Q. Did you cut it yourself?

A. I cut it myself.

Q. And you put it through your regular process of chemical analysis?

A. Yes.

Q. For what purpose?

A. To determine the fiber composition.

Q. That is, as to whether the said fibers were wool or cotton?

A. Yes.

Q. And how much of each?

A. Yes.

Q. And did you make your report to the Director of the Bureau, Mr. Stratton, as to the result of that analysis?

A. Well, let's see, yes; I would say that is the proper way of saying it.

Q. Does the paragraph beginning "(1)" in commission's  
596 Exhibit 32 state the result of your analysis?

A. Yes.

Mr. CLARK. That is all.

Cross-examination by Mr. MOLLAY:

Q. In making your analysis, Mr. Clark, how large a sample did you take from the undershirt?

A. Why, it was a matter of several square inches.

Q. You took one sample from the garment, just one sample?

A. I don't recall.

Q. Well, the total, whether one or more, it was just a matter of a few square inches that you cut from the garment?

A. Yes.

Q. And the garment itself was a full sized, ordinary undershirt?

A. Yes.

Q. Would you testify as an expert, Mr. Clark, that the sample of that size taken from a garment of that size, that the analysis was a fair representation of the content of the entire garment, or merely of the content of the sample which you analyzed?

Mr. CLARK. Well, I object to that. I don't think the witness is competent to answer that.

Mr. MOLLOY. He made the analysis.

Mr. CLARK. He can only speak for this sample.

Mr. MOLLOY. Read the question.

(Question read as above recorded.)

A. Representative of the entire garment.

Q. On what do you base that conclusion as an expert, Mr. Clark?

A. Just general practice. In the making up of woollens for knitting in large quantities it would not be practical to make one portion of the garment vary from any other portion more than a few per cent.

Q. There would be room for the difference of a few per cent?

A. Possibly, but not probably.

Q. Don't you know—are you acquainted with the making of the batches and the results that general analysis will show as to the content of garments made from any particular batch as to whether or not they run uniform to the amount put into the batch?

A. Within a few per cent.

Q. There is a variance of a few per cent of the content of the garment?

A. Well, by poor manufacturing it might be done.

898 Q. Have you ever been chemist in a manufacturing plant?

A. I am at present.

Q. What kind?

A. Oilcloth.

Q. No textile manufacturing plant?

A. No.

Q. What is the usual method of finding the content of wool in a garment?

A. Well, the first thing to do is to determine what fibers are present. That is usually done microscopically. Then, having learned that a fabric or knitted article contains cotton and wool by microscopic examination, we can dissolve the wool by treatment with caustic soda, leaving only cotton and all the cotton.

Q. And then you take the weight of the sample before burning off the wool and then you take the weight afterwards, and from that you take the relative percentages?

A. With various precautions that are customary.

Q. What are they?

A. That is a question largely of determining the amount of moisture in the fiber before and after the treatment.

899 Q. And that is left entirely—that is a matter for experts to determine—it is not a mathematical certainty?

A. Yes; it is.

Q. What test did you make in this particular case for the presence or nonpresence of moisture?

A. Drying.

Q. Were these samples dried before you burned out the wool content?

A. Oh, yes.

Q. What other process is used to determine the content of wool or cotton in a garment made of cotton and wool?

A. I have already mentioned the method of using the microscope, whereby the amount is merely approximated. Another method sometimes mentioned in textbooks, although very inaccurate, is to dissolve the cotton in concentrate acid, leaving the wool unaffected.

Q. One would be a check on the other, would it not?

A. No.

Q. Why not?

A. Because the method of dissolving cotton is inaccurate.

Q. In taking the test of this particular sample you followed the method of burning off the wool with caustic soda?

A. The correct term would be dissolved the wool.

900 Q. Did you bring with you your original laboratory result or report?

A. To-day?

Q. Yes.

A. No.

Mr. MOLLOY. That is all.

Mr. CLARK. That is all.

W. W. BIRCH.

#### Direct examination:

Mr. CLARK. It is stipulated by counsel for the commission and respondent that the following is received in evidence in lieu of the testimony of W. W. Birch, of Chicago, editor of the American Sheep Breeder, which I now offer, subject to objections of counsel for respondent.

Mr. MOLLOY. I object to it on the ground that it is irrelevant, immaterial, and not within the issues of the case, and not binding upon the respondent.

(The matter referred to follows:)

901 "My education, experience, and research respecting merino sheep covers a period of 40 years, during which time I have bred American merinos, Rambouillet merinos, and Delaine merinos.

I have also been closely identified with the merino industry through connection with a publication known as the American Sheep Breeders, which I now edit. This magazine was established 40 years ago, and I have been with it from the first issue.

"The merino is the oldest distinct breed of sheep in the world, originating many centuries ago in Spain, and, according to the best

records known, was developed from sheep imported into Spain from Italy and North Africa. The merino found its way into France and Germany. In France it was known as the 'French merino' or 'Rambouillet merino.' In Saxony in Germany it was known as the 'Saxony merino,' from which the finest wool in the world was grown. In Germany the 'Rambouillet merino' has long been known as the leading breed in that country, and many shipments have been made to South America and the United States. France has also shipped to the United States a large number of 'Rambouillet merinos.' The 'Rambouillet merino' is the most important breed in France and Germany to-day.

"Seth Adams imported the first Spanish merinos into the United States in 1801. The next year another importation was made 902 by Col. David Humphreys. From these Spanish importations the 'American merino' was established and is well known throughout the world to-day, many of these sheep having been shipped to Australia, South Africa, and South America. The 'delaine merino,' a distinct type, has been developed from the 'American merino.' The 'delaine merino' grows the fine grade of wool known as 'delaine wool.' The 'American merino,' 'Rambouillet merino,' and 'delaine merino' are commonly known as merino sheep in the United States. There are flock registry associations for each of these merino types. In these flock registers are recorded pure-bred sheep of these types. For years the 'Saxony merino' was bred in several sections of the United States from sheep imported from Saxony in Germany. There are few, if any, pure-bred Saxony sheep in the United States to-day.

"The merino sheep has always been recognized as the foundation of our wool-growing industry in the United States, and up to 15 years ago around 65 per cent of the wool grown was classed as 'fine wool,' which comes from the merino sheep. Since that time English breeds growing the coarser wools have been crossed on the merino and the fine wool clip has decreased both in the East and in the West. For many years 'American merino,' 'delaine merino,' and 'Rambouillet merino' rams were used extensively in the range States 903 where wool known in the market as 'territory wool' is produced. Rams of the English breeds are now used extensively in the West, but the 'Rambouillet merino' rams are still more largely used than any other breed in that section to-day. Also in Texas the 'American merino' ram is being introduced again. The high price of fine wool is making heavy demands on the raisers of merino sheep.

"As to the percentage of merino sheep in the United States to-day, reports by agents to the Bureau of Crops, recently published, show that the merino is 25.4 per cent and the Rambouillet merino 13.3 per cent of all breeds raised. This would mean that nearly 40 per cent of all sheep in the United States are merinos.

"The recognized market grades of wool produced from sheep commonly known as merinos are as follows:

"Merino (Eastern States): Delaine, XX, X, or fine unwashed, etc.

"Merino (range States): Fine and fine medium staple or clothing.

"Rambouillet: Fine and fine medium staple or clothing and a small amount of half blood.

"The merino is the dominating breed in Australia, which country produced a larger volume of fine wool than any other. Merino rams in Australia this year brought the highest price ever known 904 for any breed of sheep, four rams selling at \$20,000, \$18,250, \$18,000, and \$17,500, respectively. Merinos are largely used in South America and South Africa. In these countries merino rams sell for thousands of dollars each.

"The importance of merino sheep in the United States is recognized by the high prices obtained for rams. Two years ago a Utah Rambouillet merino breeder sold a ram at the Salt Lake sales for \$6,200, the highest price ever paid in the United States for a ram of any breed. A Rambouillet breeder in Wyoming recently sold a ram to Australia for \$5,000. The same breeder is now negotiating the sale of a Rambouillet merino ram for \$10,000 to a South African sheep breeder.

"By way of comparison of merino wools grown in all countries, it might be said that wool from merino sheep in the United States, competing against all foreign countries, has won first prize at the Chicago World's Fair, the St. Louis World's Fair, and the Melbourne Exposition in Australia.

"Not only in the United States but in Australia, South America, and South Africa the merino is regarded as an indispensable breed in the wool-growing industry.

"It can be truthfully said that there is a great shortage 905 of merino wool throughout the world and manufacturers in all countries are eager to pay the highest price for this class of wool."

LINCOLN CROMWELL was thereupon recalled as a witness, and, having been duly sworn, testified as follows:

Direct examination by Mr. CLARK:

Q. You testified, I think the other day, Mr. Cromwell, that the percentage of cotton in all the Root Mfg. Co. underwear was, to the best of your knowledge, less than 20 per cent; am I correct?

A. Yes; but I didn't understand that I was testifying definitely, or that it was material to give exact figures, and you have since called to my attention certain facts. We do make a number of children's goods that contain about 12 per cent normally, but in the later winter of 1919 I find through you for the first time that the Root Mfg. Company furnished you with some swatches of cloth, and attached to each of these swatches a copy of the label that was used



on the outside of the box containing underwear made of that sort and on each swatch they put the stamp which they had been  
 906 using on that cloth. That in one case only 5 per cent of wool was in the cloth, and in another there was 10 per cent, and in three others 12 per cent. All of these swatches were made in the last half of 1918. Owing to the unsettled conditions of the war, the civilian product for the year 1918 was sold on a written agreement with our customers that if conditions warranted changes of price by the middle of 1918 that we would have a conference with all of these customers and decide whether the product for the last half of 1918 should be delivered to the customers in the original quality with the change in price or whether we should continue at the original price but make modifications in the quality of the different cloths. A conference of that kind was held, and it was unanimously decided by the customers that it would be less upsetting if the price was maintained and the percentage of wool in some of the low-grade things was lowered. Therefore exceptional, and they were not in my mind at that time—that is, they are a matter of two years ago—and since then the quality has been restored, but the price increased.

Q. The action then was first for a lower percentage of wool because the cost of wool was so high?

A. Yes; and then the mounting labor and overhead.

907 Q. How long have these conditions prevailed?

A. These conditions have prevailed up until the last six months.

Q. Well, wool is much cheaper, is it not?

A. Within the last six months. I would like to call your attention, Mr. Clark, to a phrase in the letter which you sent to me. It was written in February, 1919. Your letter said that the term Scotch and Australian wool and those other terms that were already discontinued and not in the new labels, those would be omitted. I was a witness in the Goldenberg case in Washington, and there for the first time had my attention called to the possibility of someone being deceived by these labels, and I wrote to the mill at once that I thought they would be subject to the same criticism, and they had better make these changes, and we started to make these changes before the Federal Trade Commission served us with notice in the matter.

Mr. MOLLOY. I move to strike out the testimony of the witness as to what prompted the Root Mfg. Co. or himself to discontinue the use of these terms as not within the issues of this case and not binding upon the respondent.

908 Examiner McKEAG. The motion will be reserved for the commission.

Q. Have you knowledge of the price of wool in the year 1917 and 1918 relative to the price for the series of years preceding?

A. Yes. The price of wool ran—I think it would be safe to say, in a rough way, it was three times as high in the beginning of 1918 as they were in the middle of 1914.

Q. Well, were they about that height in 1916 and 1917?

A. They were rising. The war was, of course, consuming a great deal more than had been used before.

Q. Do you know when the maximum was reached—speaking generally?

A. I think the maximum was reached in September, 1918.

Q. One other matter. In the record appears a resolution adopted by the manufacturers October 18 in Albany. What was the origin of that resolution?

A. That resolution was adopted after a very general discussion among the underwear manufacturers who were there. I think it was passed primarily upon a set of resolutions that were suggested to the meeting by Mr. Gaylord, of the Winsted Hosiery Company, who was there with Mr. Molloy.

Mr. CLARK. That is all.

909 Cross-examination by Mr. MOLLOY:

Q. Mr. Cromwell, the price of cotton went up pretty much in the same proportion as wool, did it not?

A. Fully as much. I think 30 to 35 a pound.

Q. And the fluctuating content in the underwear garment in reducing the wool content to make a cheaper garment, that really was applied before the war just the same as during the war?

A. Yes, but there had never been any such violent fluctuation changing from 50 cents to \$1.60 as there was during the war. I mean there was an advance of \$1 in wool and 20 cents in cotton.

Q. But in supplying the trade, the price that the trade can pay for the garment that they desire to distribute, the content depended largely upon the price, whether there should be more or less wool?

A. It has been the policy of the Root Mfg. Company for a great many years to keep its price list unchanged, and the fluctuation in the cost of raw material has been so slight that it is imperceptible.

By Mr. CLARK:

Q. With the exception of the period during the war?

A. With the exception of the period during the war.

910 Mr. MOLLOY. That is all.

EDWARD B. GAYLORD, recalled.

Mr. MOLLOY. It is stipulated by counsel for the commission and the respondent that if Mr. Gaylord were recalled he would testify as follows:

"The records of the Winsted Hosiery Company show that it sold Goldenberg in the year 1917 seven styles of goods. The record of all the mixtures of the company shows that the lowest percentage mixture made by it during the latter part of 1916 and during 1917 contained 20 per cent wool. This applied to one style only. Other mixtures during that period contained, respectively, 33 $\frac{1}{3}$ %, 40 $\frac{1}{2}$ %, 43%, 51 $\frac{1}{2}$ %, 59%, and 67% wool."

Mr. CLARK. It is stipulated by counsel for the commission and for respondent that the results of the census of 1919 as to the manufac-

tures of textile goods, including underwear, were not available to counsel at the time of taking of testimony in this proceeding.

The commission rests.

Mr. MOLLOY. The respondent rests.

Examiner McKEAG. I declare proofs closed in this case.

(Whereupon, at 11.30 a. m. December 23, 1920, the hearings in the above-entitled case were adjourned sine die.)

911 United States Circuit Court of Appeals, for the Second Circuit.

No. 200—October Term, 1920.

Argued March 22, 1921. Decided April 13, 1921.

WINSTED HOSIERY COMPANY, PETITIONER,	}
<i>v.</i>	
FEDERAL TRADE COMMISSION, RESPONDENT.	}

PETITION TO REVISE ORDER OF THE FEDERAL TRADE COMMISSION

Before Ward, Hough, and Manton, Circuit Judges.

Wood, Molloy & France, for petitioner; M. J. France, of counsel J. T. Clark and H. Farrington, for respondent.

WARD, Circuit Judge:

October 30, 1918, the Federal Trade Commission issued a complaint against the Winsted Company for a violation of section 5 of the act of September 6, 1914, it appearing to the commission that a proceeding by it in respect thereof would be to the interest of the public.

912 The particular charge made was:

"Paragraph three: That for more than one year last past the respondent, Winsted Hosiery Company, with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has, in the conduct of its business, manufactured and sold in commerce aforesaid, and labeled, advertised, and branded certain lines of underwear composed of but a small amount of wool as—

" 'Men's Natural Merino Shirts,'

" 'Men's Gray Wool Shirts,'

" 'Men's Natural Wool Shirts,'

" 'Men's Natural Worsteds Shirts,'

" 'Australian Wool Shirts.'"

"That such advertisements, brands, and labels are false and misleading and calculated and designed to and do deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool."

The answer of the defendant set up among other things:

"Paragraph two: Denies each and every allegation contained in paragraph marked 'Paragraph third' of the complaint herein, except that the respondent admits that for more than one year last past it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labeled, advertised, and branded certain lines of underwear as—

"Men's Natural Merino Shirts,"

"Men's Gray Wool Shirts,"

"Men's Natural Worsted Shirts,"

"Australian Wool Shirts,"

"Men's Natural Wool Shirts."

913 And respondent further admits that such underwear so manufactured and made are not composed wholly of wool.

For a further and separate defense to the complaint herein, respondent alleges as follows:

"Paragraph third: That for the past 20 years and at the present time it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as 'Natural merino,' 'Wool,' 'Natural wool,' 'Natural worsted,' and 'Australian wool,' when such underwear so described is not composed wholly of wool, but on the contrary are composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served; and further, that said general custom and practice has been and now is universal in the underwear trade throughout the United States and has been followed by all the manufacturers engaged therein; and further, that said general customs and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States."

For the purpose of expediting the proceeding and of avoiding the time and expense incident to a hearing, a statement of facts was agreed upon which contains among other things:

"Paragraph seven: That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as 'Natural merino,' 'Wool,' 'Natural wool,' 'Natural worsted,' and 'Australian wool,' when in fact such underwear so described is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different

914 mills manufacturing underwear to meet the varying demands of the trade solicited and served, that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as 'All wool'; that large quantities of underwear and similar wearing

apparel has been imported into the United States from foreign countries and it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, braided, and advertised as 'Wool,' 'Merino,' and 'Worsted' underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but, on the contrary, is composed partly of wool in varying percentages."

The commission filed its conclusion of law as follows:

"From the foregoing findings the commission concludes that the method of competition set forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.'"

And issued its order to cease and desist as follows:

"Now, therefore, it is ordered that the respondents, Winsted Hosiery Company, its officers, agents, representatives, servants,  
915 and employees, cease and desist from directly or indirectly employing or using the labels and brands 'Wool,' 'Merino,' and 'Worsted,' or any similar descriptive brands or labels on underwear, socks, or other knit goods composed partly of wool, except either (1) when a knit fabric is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric (e. g., wool-and-cotton; worsted-and-cotton; wool-worsted-merino, and cotton; worsted, cotton, and artificial silk).

Respondent is further ordered to file a report in writing with the Commission three months from notice herof stating in detail the manner in which this order has been complied with and conformed to."

March, 1920, the Winsted Company filed its petition in this court to set aside the order.

Thereupon the Commission applied for permission to take additional evidence under section 5 of the act, which was granted. A great deal of testimony was taken by the Commission which fully established that the trade was not misled in any respect by the label complained of. But some witnesses testified that in their opinion some part of the consuming public was or might be misled into thinking the underwear so described was pure wool.

January 14, 1921, the following modification of its original order to cease and desist was issued by the Commission:

"This proceeding having been heard by the Federal Trade Commission upon complaint of the Commission, the answer of the respondent, the statement of facts, agreed upon by counsel for the Commission and respondent, and upon the additional evidence taken for the Commission under an order of the United States Circuit

916 Court of Appeals, for the Second Circuit, dated October 18, 1920, and the Commission having, by reason of such additional evidence, modified some of its original findings and adopted new findings as to the facts and adopted its conclusion, that the respondent has violated the provisions of the act of Congress, approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' it now recommends the following modification of its original order to cease and desist herein, dated January 20, 1920:

"It is now ordered that the respondent, the Winsted Hosiery Company, its officers, agents, representatives, servants, and employees, do cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the word 'Merino,' 'Wool,' or 'Worsted,' alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g., 'Merino, Wool, and Cotton'; 'Wool and Cotton'; 'Worsted, wool, and cotton'; 'Wool, cotton, and silk'), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g., part wool).

"Respondent is further ordered to file a report in writing with the Commission three months from notice hereof, stating in detail the manner in which this order has been complied with and conformed to."

The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public. And if such method of competition is prohibited by the act to issue an order requiring the person or corporation using it to cease and desist from doing so. We have heretofore so understood the extent of the Commission's authority in Federal Trade Commission *v.* Gratz, 258 Fed. Rep., 314; affirmed 253 U. S., 421, and New Jersey Asbestos Co. *v.* Federal Trade Commission, 264 Fed. Rep., 509.

In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of other manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly. Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition or for an injunction or damages under the anti-trust acts. Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning the result is in no way connected with unfair competition, but is like any other mis-

description or misbranding of products. Conscientious manufacturers may prefer not to use a label which is capable of misleading and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so.

The order is reversed.

918 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post office building in the city of New York, on the 23d day of April, one thousand nine hundred and twenty-one.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, *Circuit Judges*.

WINSTED HOSIERY COMPANY, PETITIONER, }

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT. }

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION.

This cause came on to be heard on the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the said order of ————, and it hereby is reversed.

H. G. W.

C. M. H.

It is further ordered that a mandate issue to the said Federal Trade Commission in accordance with this decree.

919 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. *Winstead Hosiery Co. v. Fed. Trade Com.* Order for Mandate. United States Circuit Court of Appeals. Filed Apr. 25, 1921. William Parkin, clerk.

920 United States Circuit Court of Appeals, Second Circuit.

WINSTED HOSIERY COMPANY, PETITIONER, }

*vs.*

FEDERAL TRADE COMMISSION, RESPONDENT. }

No. 200.

It is hereby stipulated and agreed in behalf of the respondent, the Winstead Hosiery Company, that for the purposes of the record in this case to be certified by the clerk of this court to the Supreme Court in the pending application for a writ of certiorari, the summary statement being a part of exhibits 25 and 26, and constituting a capitulation of the questionnaires constituting the remainder of these exhibits, may be taken as part of the record so

certified for all the facts stated in the said preliminary capitulations, and that the individual questionnaires need not be printed as part of the record, but the facts relating thereto as appear from the summaries named will be taken as representing the individual questionnaires.

ADRIEN F. BUSEIK,

*Attorney for Respondent.*

WOOD, MOLLOY & FRANCE,

*Attorneys for Petitioner.*

So ordered.

(Sgd.)

H. G. WARD, *U. S. C. J.*

UNITED STATES OF AMERICA,

*Southern District of New York, ss:*

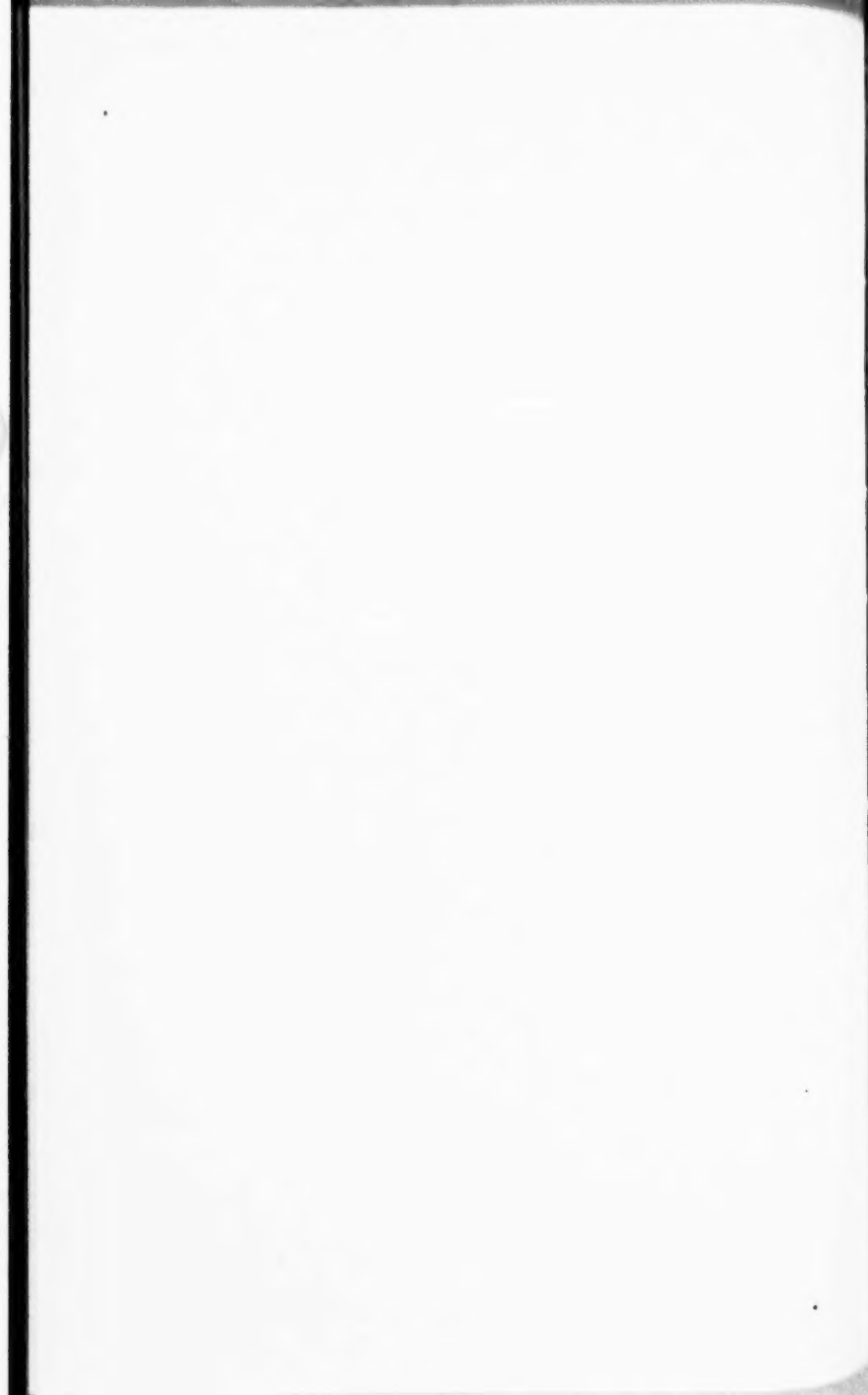
I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 920, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Winsted Hosiery Company against Federal Trade Commission, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 10th day of May in the year of our Lord one thousand nine hundred and twenty-one and of the independence of the said United States the one hundred and forty-fifth.

[SEAL.]

WM. PARKIN, *Clerk.*





### **EXHIBITS.**

Following are reproductions of the exhibits introduced in evidence in connection with the testimony as certified, except such exhibits or parts of exhibits, consisting of garments, box, etc., which can not be graphically or conveniently reproduced.

The original exhibits so omitted below are: Nos. 2 (box), 19, 20, 21 and 22 (shirts), and 30 (census form).



Oct 11-1915  
2265 N  
Hills Batch

2265 N	MEN'S NATURAL PATENT		MERINO SHIRTS SEAM Exhibit	2-12 Doz. 40 in.
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Mar 11-1916  
2383 G  
Swatch

2383 G	MEN'S Gray Patent		Merino SHIRTS Seam Exhibit	2-12 Doz. 3 in.
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Mar 16-1916  
3583 N  
Swatch

3583 N	MEN'S Natural Full		Worsted SHIRTS Fashioned Exhibit	2-12 Doz. 4 in.
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Oct 23-1915  
2323 N  
Hills Batch

2323 N	MEN'S NATURAL PATENT		WOOL SHIRTS SEAM Exhibit	2-12 Doz. 40 in.
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Apr 1-1916  
2325 G  
Swatch

2325 G	MEN'S GRAY PATENT		WOOL SHIRTS SEAM Exhibit	2-12 Doz. 40 in.
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Exhibit 7 (Respondent 1)

# GLASTENBURY

## UNDERWEAR



**TWO  
PIECE**



REG. U.S. PAT. OFF.



REG. U.S. PAT. OFF.



**UNION  
SUITS**

**PROTECTION** against chilling of the body; often a forerunner of colds, pneumonia and rheumatism.

**EVERY GARMENT** is made of the finest material and guaranteed not to shrink.

**FEDERAL COMMISSION**

Five	Gray	Winter	Prices
Weight, four qualities.			<b>\$2.50</b>
Five	Gray	Winter	
Weight, four qualities.			<b>to \$7.00</b>
Five	Woolen Merino	Medium weight.	Per Garment
			Regular Sizes.

For Sale by Leading Dealers  
**ROBERT REIS & COMPANY**

Wholesale Distributors  
Write for booklet—sample cuttings. Yours for the asking.  
Dept. 6  
THE GLASTENBURY KNITTING CO.  
Glastenbury, Conn.



## COMMISSION'S EXHIBIT 9.

NOVEMBER 12TH, 1919.

### REPORT OF THE COMMITTEE ON UNDERWEAR LABELING TO THE KNIT- GOODS MANUFACTURERS OF AMERICA.

GENTLEMEN: Your committee has carefully considered the complaint of the Federal Trade Commission that a number of the most reputable American manufacturers of underwear are using descriptive words on their labels which are likely to mislead the public as to the quality of the underwear. We have received complete lists of the labels complained of, and we have made a wide inquiry among other manufacturers, as well as among retail and wholesale dealers as to the underwear labels in use. We find that all of the descriptive terms complained of by the Federal Trade Commission have been used on the labels for the same underwear for a number of years, in some cases for nearly half a century, and that these products are to-day among the most popular and respected in the country, showing beyond question that these manufacturers have kept their customers through the intrinsic value of their products which the consumer has worn, and not through wordings on labels of boxes usually left in the retail store.

Neither the jobber nor the retailer buys his underwear under the influence of box labels. Samples are not shown in boxes. They carry only our price tickets. With the underwear manufacturer the label has been an after-thought, because it played no part in his selling. Your committee believes that the Federal Trade Commission exaggerated the influence which labeling on underwear boxes can have under the American system of retail selling where reputable stores practically warrant the value of all goods sold. We are, however, so jealous of the fair name of our industry, and of our individual reputations for fair dealing, that we have considered this complaint in the broadest way with the sole object of freeing the industry from any abuses which may have been made of our labels by dealers over whom we have no control, because of words used on the labels which meant one thing to the manufacturer and the dealer, but were capable of being misunderstood by the public.

It is fair to suppose that the public will assume that any word on a label carries the meaning given in one of the standard dictionaries. We have taken the definitions in the Century, the Standard, the International and Worcester's dictionaries of all the words complained of, including wool, natural wool, woolen, merino, woolen merino, worsted, cashmere, camel hair, and basing our suggestions on these dictionary meanings rather than upon any understanding of them by manufacturers and dealers, we offer the following table of descriptive terms, setting opposite each class of underwear three



lists of descriptive terms now used to describe it on box labels. In the first list are words which are not only beyond any chance of criticism, but are approved by the experience of many large distributors. They limit the label to its simplest terms, such as the mill name, the brand name, and the word undershirt, union suits, etc., with the color, size and quantity, and define the quality in exact terms, such as "Wool Underwear" or "Worsted Underwear," both meaning all wool knitted fabrics. In the second list is a set of words which are clearly permissive under the dictionary definitions, and while they are not so definite as the first list, we see no reason why mills using them should change their labels. The third list contains words which we believe are properly complained of because they could be used by an ignorant or dishonest clerk to deceive a customer as to the material content of the underwear.

Materials Used.	Recommended Label Words	Permissive Label Words	Improper Label Words
ALL Wool Carded Stock...	(1) Featuring only the mill, as Howard Knitting Company Men's Undershirts Gray Mixed  (2) Featuring only the brand, as Crescent Brand Men's Undershirts Gray Mixed  (3) Featuring only this season, as MEN'S Winter Underwear Shirts White  (4) Featuring only the weight, as MEN'S Heavy Weight Underwear Shirts Camel Hair Color.  MEN'S Wool Underwear Shirts		
ALL Wool Combed Yarns.	MEN'S Worsted Underwear Union Suits		
Worsted Merino Yarn only.	MEN'S Worsted Merino Ribbed Union Suits  MEN'S Merino Ribbed Shirts		
Worsted & Cotton Yarns...	Worsted & Cotton Ribbed Undershirts	Worsted Merino Shirts	Worsted Underwear
Worsted Merino & Cotton Yarns	Worsted Merino & Cotton Union Suits	Worsted Merino Suits	Worsted Underwear
Worsted Silk & Cotton Yarns	Worsted & Cotton Ribbed Underwear Silk Striped		

Underwear made of, or striped with, artificial silk, or mercerized cotton, must not be labeled silk or silk striped, but carry on the words artificial silk or mercerized cotton as the case may be. "Silkeline" or "Silkateen" are trade words and are not recommended as describing mercerized cotton.

Materials Used.	Recommended Label Words	Permissible Label Words	Improper Label Words
Wool & Cotton.....	Same as 1, 2, 3 & 4 or MEN'S Wool & Cotton Underwear Shirts	Woolen Underwear...  Merino Underwear....	Wool Underwear Worsted Underwear Natural Wool " Camel Hair " Flat Wool " Wool Ribbed " Fine Wool Shirts Natural Gray " Scotch Wool Persian Wool Australian Wool Lamb's Wool Persian Fleece Saxony Wool Natural Mixed Wool Fine Natural Vests Natural Merino

All wool, and wool and cotton mixed underwear made partly of genuine camel hair, or of Australian wool, etc., may properly have on the labels the words "Contains Genuine Camel Hair," or "Made Partly of Australian Lamb's Wool." Only if the fabric contains no dyed stock and is all wool may the words "Natural Wool" be used on the labels. Colors are best described by gray, gray mixed, camel hair *color*, blue random, white, scarlet, etc.

#### COTTON UNDERWEAR.

The chief criticism of cotton underwear labeling has been over the word Egyptian applied to fabrics dyed in imitation of Egyptian cotton. Some of these labels could easily be read as a warranty that the underwear was made of genuine Egyptian cotton. Where the contents is a dyed fabric the word Egyptian should never appear on the box label unless joined with the word color.

"French Balbriggans" appears on many labels of summer underwear made in America. It may fairly be argued that these words are so commonly understood to describe a class of underwear without any reference to the country of origin that no man would go home believing that these balbriggans were imported any more than he would suppose the French pastry on the bill of fare was baked in France. But balbriggan underwear (in negligible quantities at present) is imported from France, and as we shall demand of the Federal Trade Commission that imported underwear shall be labeled in strict accordance with the rules made for American manufacturers, we advise that the word French be dropped from the labels and stamping of all American made balbriggans.

Your committee cannot too strongly state its belief that the Federal Trade Commission was not warranted in publishing charges against underwear manufacturers without first giving them a hearing, and that these charges should be publicly withdrawn so far as they imply any intentional wrong doing on the part of the manufacturers cited. The labels complained of have played no part in our sale of the goods; but as we would not permit our own salesmen to misrepresent our products, so we must use every care to prevent others from misrepresenting them to the consumer. It is not necessary for us to believe that our labels have misled a single consumer. We want them to be exact beyond any misunderstanding.

Your Committee believe that the label changes recommended above are in the best interest of the industry, and that your Committee should be authorized to file a copy of this report with the Federal Trade Commission as representing the attitude of this Association and of its members, and that the Committee be authorized to appear personally before the Commission if requested to make any further explanations. It is further recommended that a copy of this report should be sent to the National Association of Dry Goods Jobbers, so that its members should have our action in mind when ordering the labels which they furnish manufacturers, pending final action on this matter by the Federal Trade Commission.

MR. LINCOLN BROMWELL,

*Chairman, Wm. Iselin & Co., N. Y. C.*

MR. JAMES H SHINE,

*Hope Ktg. Company, Cohoes, N. Y.*

MR. WILLIAM TIERNEY,

*Moore & Tierney, Cohoes, N. Y.*

MR. L. R. BRSLIN,

*Waterford Ktg. Co., Waterford, N. Y.*

MR. E. B. GALORD,

*Winsted Hosiery Co. Winsted, Conn.*

MR. BERNARD L. CONNELL,

*Lackawanna Mfg. Scranton, Pa.*

MR. FRANK H BURGHIER,

*Bliss, Fabian & Co. New York City.*

MR. OSCAR W GRIDLEY,

*Utica Ktg. Co., Utica, N. Y.*

## COMMISSION'S EXHIBIT 10.

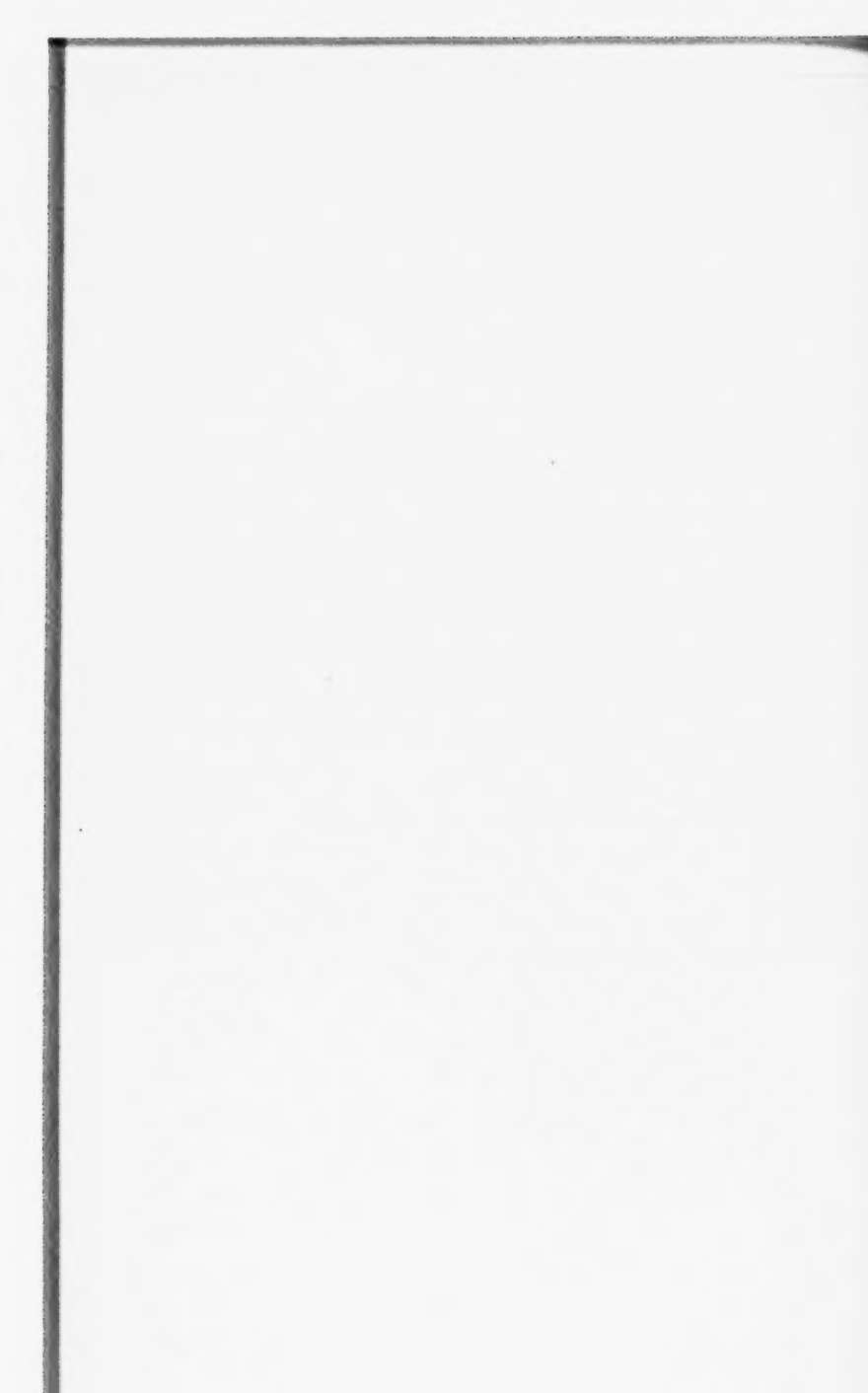
### USE OF WORDS WOOLEN AND MERINO RESOLUTIONS ADOPTED BY THE KNIT GOODS MANUFACTURERS OF AMERICA NOVEMBER 18, 1920.

Whereas the label report adopted by this Association in November 1919 permitted the words "woolen" and "merino" to be used on labels covering knit goods made partly of wool and partly of cotton, and

Whereas, such use of these words has been criticised before the Federal Trade Commission as tending to deceive retail salesmen or consumers into thinking the fabric all wool when in fact it may be chiefly cotton, therefore be it

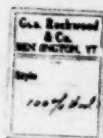
*Resolved*, That this Association request all its members to discontinue the words "woolen" and "merino" on their labels and stamps, unless followed by the words "wool and cotton," and

*Resolved*, That a copy of this resolution be filed with the Federal Trade Commission with a statement that the words "woolen" and "merino" have never to our knowledge been used in unfair competition, and that this action is taken only because we are informed that in parts of the United States remote from the manufacturing districts these words mean all wool or merino quality of wool, and because this Association is anxious to avoid all chance of deception in the sale of its products to the consumer.



Doc. 214 COMEX 6.

Exhibit 11



STYLE	<p>NEW BRITAIN - CT.</p> <p>7 1919</p> <p><b>NATURAL WOOL SHIRTS</b></p> <p>DECKET DIVISION</p>	<p><b>2.18 DOL</b></p> <p>Com.</p> <p>11</p>
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Doc. 219

*Exhibit 13*

*Sheet 1 and 2*

Style No.	MEN'S	Size
Shape	UNION SUITS	3-12 Doz.

STYLE NO.



*Sherburne Mills*

**MENS DRAWERS**

SIZE

PRICE

1/2 Doz.

SHERBURNE KNITTING CORPORATION, SHERBURNE, N.Y.

STYLE NO.

13-20E

**AUGUSTA**

SIZE

**MENS' SHIRTS**

PRICE

6-12 Doz.

Long Sleeve

AUGUSTA KNITTING CORPORATION, - UTICA, N.Y.

STYLE NO.

**HIGHEST QUALITY NON-SHRINKING**

SIZE

**MENS DRAWERS**

PRICE

Adult Length

MADE FROM THE FINEST YARNS

6  
12

LOT No.	COMFORT <b>WONDERWEAR</b> SERVICE	SIZE
SHAPE	UNION SUITS	DOZEN

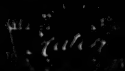
COMFORT  
**WONDERWEAR**  
SERVICE  
UTICA, N.Y.

*Augusta* "BEST  
QUALITY"  
CUSTOM  
FIT AND WE ARE  
Augusta Knitting Corp.  
UTICA, N.Y.





Dec. 214 COM'R'S.  
Exhibit 16

<b>HATCH ONE-BUTTON UNION SUIT</b>	
STYLE 	SIZE 14 <span style="float: right;">3/12 DOZ.</span>
Time Saving	Form Fitting

MEN'S		1 Dozen
<b>SANITARY AUSTRALIAN WOOL</b>		SIZE
<b>JERSEY RIBBED SHIRTS</b>		
SUPERIOR FINISH		

Style	<b>MEN'S - MERINO (WOOL &amp; COTTON)</b>	Size
	<b>JERSEY RIBBED DRAWERS</b>	
Superior Finish	2-12 DOZEN	Steam Shrunk

Dec. 214 COM'R'S.  
Exhibit 17

 <b>WAKEFIELD BRAND</b>	<b>WAKEFIELD KNITTING MILLS</b>	SIZE
	<b>WOMEN'S SUITS</b>	<b>38</b>
		STYLE
<b>2/12 DOZEN</b>		

*Wakefield Mills*



Doc. 214 COMMERCE.  
Exhibit 23

STYLE	Mens <i>The Yorkham Mfg. Co.</i> Drawers	SIZE
-------	--	------

Doc. 214 COMMERCE.  
Exhibit 24  
Sheet I

*Sikes & Company*

No 22556

Size

Style

SHIRTS.

Color GRAY

Quality

Price

557

*Mandel Brothers*

Men's Shirts

WHITE ★ BRAND	R.H. WHITE CO. BOSTON	2253 N SHIRTS
---------------------	--------------------------	------------------

132 S	THE WINONA UNDERWEAR CO. 1 & 2 REMARKS: TRADE SUPERIOR UNDERWEAR FROM MILL TO WEARER. CHICAGO, ILL. NEW HAVEN, CONN.	SIZE
-------	---	------

No. D4536	MEN'S NATURAL MERINO SHIRTS FULL FASHIONED.	2-12 Dec.
--------------	---	-----------

ARTUR LITTE <i>Broadway Department Store</i>		SIZE
---	--	------



COMMISSION EXHIBIT 25.

FEDERAL TRADE COMMISSION  
vs.  
WINSTED HOSIERY Co. } D No. 214.

In connection with the above matter a questionnaire was sent to residents of Philadelphia, Washington, New York City, Boston, Chicago, Detroit and Buffalo. These names were selected at random from the telephone directories of these various cities, with the exception that in New York City about 25 per cent of the names were supplied by the New York office of the Commission. The questionnaire was mailed during October and November, 1920, and was as follows:

"DEAR SIR: The Federal Trade Commission desires your help in ascertaining the public's understanding of the terms used by manufacturers of underwear as labels on packages or garments. The question is whether the labels below are understood by consumers to indicate all-wool fabrics or fabrics partly wool and partly cotton. Will you please indicate your understanding when purchasing shirts or underwear, as to each of the labels below, by writing opposite each the words, 'All-Wool' or the words, 'Wool and Cotton.'"

LABELS.

- "Men's Natural Merino
- "Men's Gray Wool Shirts
- "Men's Natural Wool Shirts
- "Men's Natural Worsted Shirts
- "Men's Australian Wool Shirts
- "Please state your occupation:

"-----  
(Sign here.)

"Please sign your name after answering and return by next mail, using enclosed envelope. No stamp is required.

"Respectfully,

"(Signed) MILLARD F. HUDSON, *Chief Examiner.*"

One-hundred eighty-eight copies of the above were returned to the offices of the Commission, two containing expressions from more than one person. As nineteen copies were returned with no answers to the questions, there were only one-hundred seventy-two replies received. A few did not answer as to all five terms so that the total

expressions as to a single term are somewhat less than the total number of replies received. All of the questionnaires answered and returned, referred to above are submitted herewith, except those returned blank.

An analysis of answers received as to the meaning of the several labels submitted is shown in the following table:

City.	Natural Merino.		Gray Wool.		Natural Wool.		Natural Worsted.		Australian Wool.	
	All Wool.	Mixed.	All Wool.	Mixed.	All Wool.	Mixed.	All Wool.	Mixed.	All Wool.	Mixed.
New York.....	50	20	64	12	68	8	52	21	70	5
Washington.....	9	4	10	4	12	2	10	4	10	2
Philadelphia.....	12	8	18	4	20	2	10	10	19	2
Boston.....	7	7	10	4	13	1	5	8	12	2
Chicago.....	4	0	4	0	4	0	2	2	3	0
Detroit.....	14	4	11	7	15	3	9	9	14	4
Buffalo.....	13	6	20	1	22	0	9	11	18	0
Total.....	109	49	137	32	154	16	97	65	146	13

The above tabulation was prepared from the replies to the questionnaire sent out by this office and is correct according to my best knowledge and belief.

Respectfully submitted.

H. L. ANDERSON,  
*Asst. Chief Examiner.*

COMMISSION'S EXHIBIT 26.

FEDERAL TRADE COMMISSION  
vs.  
WINSTED HOSIERY COMPANY. } D No. 214.

In connection with a similar proceeding to this, (Docket 413) a questionnaire dated June 2, 1920, was directed to residents of New York City and Washington. Names were selected at random from the telephone directories for these cities. The questionnaire sent was as follows:

"JUNE 2, 1920.

"DEAR SIR: To help settle the question of the Public's understanding of the term 'merino' as applied to underwear, will you please state your own understanding by writing your answer in the spaces after the questions below:

"When you buy underwear labeled 'merino,' or stated by the clerk to be 'merino,' do you understand that the garments are all wool or mixed cotton and wool?

"As to the term 'cashmere'?

"Irrespective of any purchases by you, do you understand that the term 'merino' as applied to underwear means all wool or mixed cotton and wool?

"As to the term 'cashmere'?

"Please return after answering by next mail in enclosed envelope. No stamp is required.

"Respectfully,

"(Signed)

"FEDERAL TRADE COMMISSION,  
MILLARD F. HUDSON,  
"Chief Examiner."

Thirty-eight replies to the above questionnaire were received by this office. As to questions 1 and 3 which relate to the use of the term "merino" two did not reply and three replied that they did not know. The thirty-three responsive replies may be summarized as follows:

As to question one, 19 stated all wool, 11 mixed cotton and wool, and 3, that it meant either all wool or mixed cotton and wool, that fact being indicated by the price.

As to question three, 20 stated all wool, 10 mixed cotton and wool and 3 that it might mean either all wool or mixed cotton and wool.

All the questionnaires returned referred to above are submitted herewith.

Respectfully submitted,

H. L. ANDERSON,  
Asst. Chief Examiner.





Doc. 214 Com'n's  
Exhibit 27

OFFICERS AND EXECUTIVE COMMITTEE

AROLD FRANKS, Vice President, San Diego, Cal.  
 Geo. G. Allen, Vice President, Birmingham, Ala.  
 Fred Voland, Vice President, New York, N.Y.  
 W. C. Egan, Vice President, Boston, Mass.  
 Julius C. Brown, Secretary, Birmingham, Ala.  
 Samuel Salinas, Corresponding Sec'y.  
 Herbert S. Greenbaum, Treasurer, N. Y.  
 H. B. Hill, Vice President, Seattle, Wash.  
 New Dale, Vice President, Denver, Colo.  
 A. J. Anderson, Vice-President, Chicago, Ill.  
 Charles C. Day, Secretary, Chicago, Ill.  
 W. A. Greenbaum, St. Joseph, Mo.  
 Colman Fred Levy, Louisville, Ky.  
 J. L. Lyles, Birmingham, Ala.

National Association of Retail Clothiers

OFFICE OF SECRETARY

CHICAGO, ILL.—222 W. JACKSON BLVD.

DIRECTORS

Charles Allen, Birmingham, Ala.  
 Harry Cooper, Little Rock, Ark.  
 George F. Green, Los Angeles, Cal.  
 Geo. F. Cottrell, Denver, Colo.  
 Geo. Greenfield, Jacksonville, Fla.  
 H. B. Green, Chicago, Ill.  
 W. A. Green, Chicago, Ill.  
 H. B. Green, Chicago, Ill.  
 Herbert A. Green, St. Joseph, Mo.  
 Robert L. Anderson, Chicago, Ill.  
 Charles C. Day, Chicago, Ill.  
 J. L. Lyles, Birmingham, Ala.  
 W. A. Greenbaum, St. Joseph, Mo.  
 Colman Fred Levy, Louisville, Ky.  
 J. L. Lyles, Birmingham, Ala.  
 Geo. G. Allen, Birmingham, Ala.  
 Fred Voland, New York, N.Y.  
 W. C. Egan, Boston, Mass.  
 Julius C. Brown, Birmingham, Ala.  
 Samuel Salinas, Corresponding Sec'y.  
 Herbert S. Greenbaum, Treasurer, N. Y.

CHICAGO, ILL.

November 18th, 1930.

Federal Trade Commission,  
 1100 Browning Building,  
 14 West Washington Street,  
 Chicago, Illinois.

Gentlemen:

At the suggestion of a representative of your office, we yesterday brought to the attention of the Board of Directors of our Association, who were in session here, the investigation which is being conducted by the Federal Trade Commission regarding the use of certain brands on knitted underwear which was not of pure wool, and which terms might be construed as misleading. The definite terms specified, we understand, were the following:  
 (1) "Natural Merino" (2) "Gray Wool" (3) "Natural Wool"  
 (4) "Natural Worsted" (5) "Australian Wool".

The following is quoted from the minutes of that meeting, approved by the Board of Directors:

"It is the sense of the Board of Directors of the National Association of Retail Clothiers that the terms (1) "Natural Merino" (2) "Gray Wool" (3) "Natural Wool" (4) "Natural Worsted" (5) "Australian Wool" used as a brand or name on underwear that contained cotton or other adulterant than wool or on the box containing such underwear might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated and that such misleading terms should not be used."

It is at the suggestion of this same representative of your body that we are forwarding the above information to you.

Very truly yours,

National Association of Retail Clothiers

Charles Allen  
 Secretary

CHICAGO



Doc. 219

Exhibit 28

210



2-12 doz

210



2-12 doz.

926



2-12 doz.

1226



2-12 doz.



COMMISSIONER'S EXHIBIT 31.

For purpose of printed record, Commissioner's Exhibit No. 31 consists of the following extract from a full-page advertisement in a Washington, D. C., newspaper:

"The Evening Star, Friday, November 23, 1917." "It pays to deal at Goldenberg's, both sides on 7th at K St., 'The Dependable Store'."

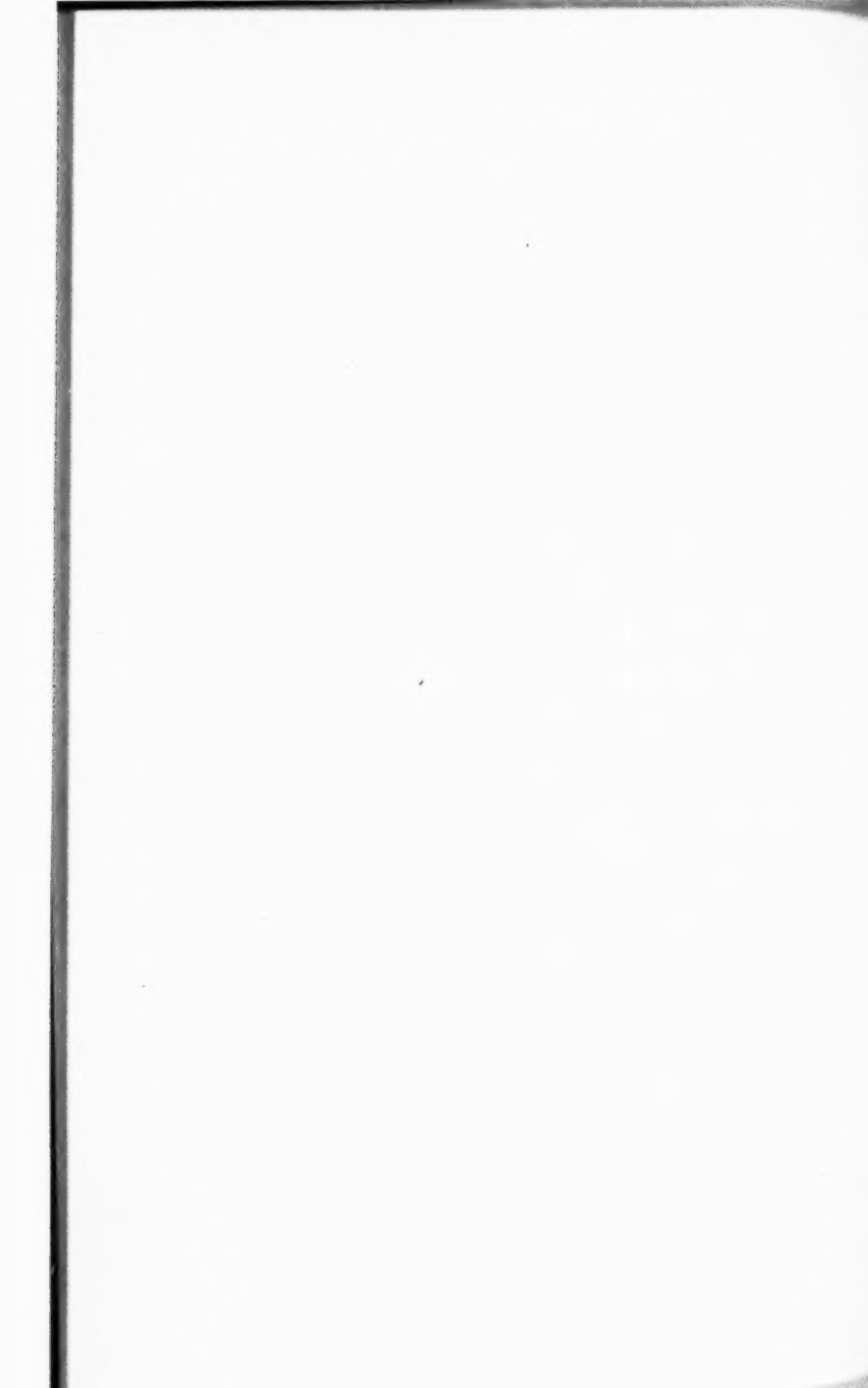
"MEN'S WINSTED MILLS UNDERWEAR: medium-weight Australian wool; shirts and drawers to match.

All sizes up to

50. Regular \$1.35 "

\$2.00 values.





ERC:OSH  
RECEIVED DEPT. OF  
BUREAU OF STANDARDS

DEPARTMENT OF COMMERCE  
BUREAU OF STANDARDS  
WASHINGTON

Nov. 27, 1917.

Mr. C. E. LaVigne,  
1335 Meridian Place N.W.,  
Washington, D. C.

Dear Sir:

The samples of underwear submitted on Nov. 28th by you as representative of the United States Attorney for the District of Columbia were found to contain the following percentages of wool and cotton:

- E.C. (1) The sample marked "Undershirt--Size 42; Label, Winsted Hosiery Co., advertised and sold as medium weight Australian wool," was found to be 90% cotton and 10% wool.
- E.D. (2) The sample marked "Undershirt--size 42; Label, Corinth Mills, advertised and sold as Men's Corinth Mills heavy weight natural wool," was found to be 50% cotton and 50% wool.

Respectfully,

*S. V. Stratton*

Director.

FEDERAL TRADE COMMISSION	
Alvin and Henry Co	
Product No.	214
Date	12/25/20
By	LaVigne
Checked by	Coigne





430 UNITED STATES OF AMERICA, *vs.*

*The President of the United States of America, to the honorable the judge of the United States Circuit Court of Appeals for the*  
 [SEAL.] *Second Circuit, greeting:*

Being informed that there is now pending before you a suit in which Winstead Hosiery Company is petitioner, and Federal Trade Commission is respondent, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to review the order of the Federal Trade Commission, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

431 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

(Indorsed:) File No. 28,288. Supreme Court of the United States, No. 931, October Term, 1920. Federal Trade Commission *vs.* Winstead Hosiery Company. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed June 24, 1921.

432 In the Supreme Court of the United States.

October Term, 1921.

FEDERAL TRADE COMMISSION, PETITIONER,	} No. 333.
<i>v.</i>	
WINSTEAD HOSIERY COMPANY, RESPONDENT.	

*Stipulation as to return to writ of certiorari.*

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein. June 15, 1921.

WM. L. FRIERSON,

*Solicitor General.*

WOOD, MOLLY & FRANCE,

*Counsel for Respondent.*

432 FEDERAL TRADE COMMISSION VS. WINSTED HOSIERY CO.

433 *To the honorable the Supreme Court of the United States,  
greeting:*

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the United States Supreme Court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, June 24, 1921.

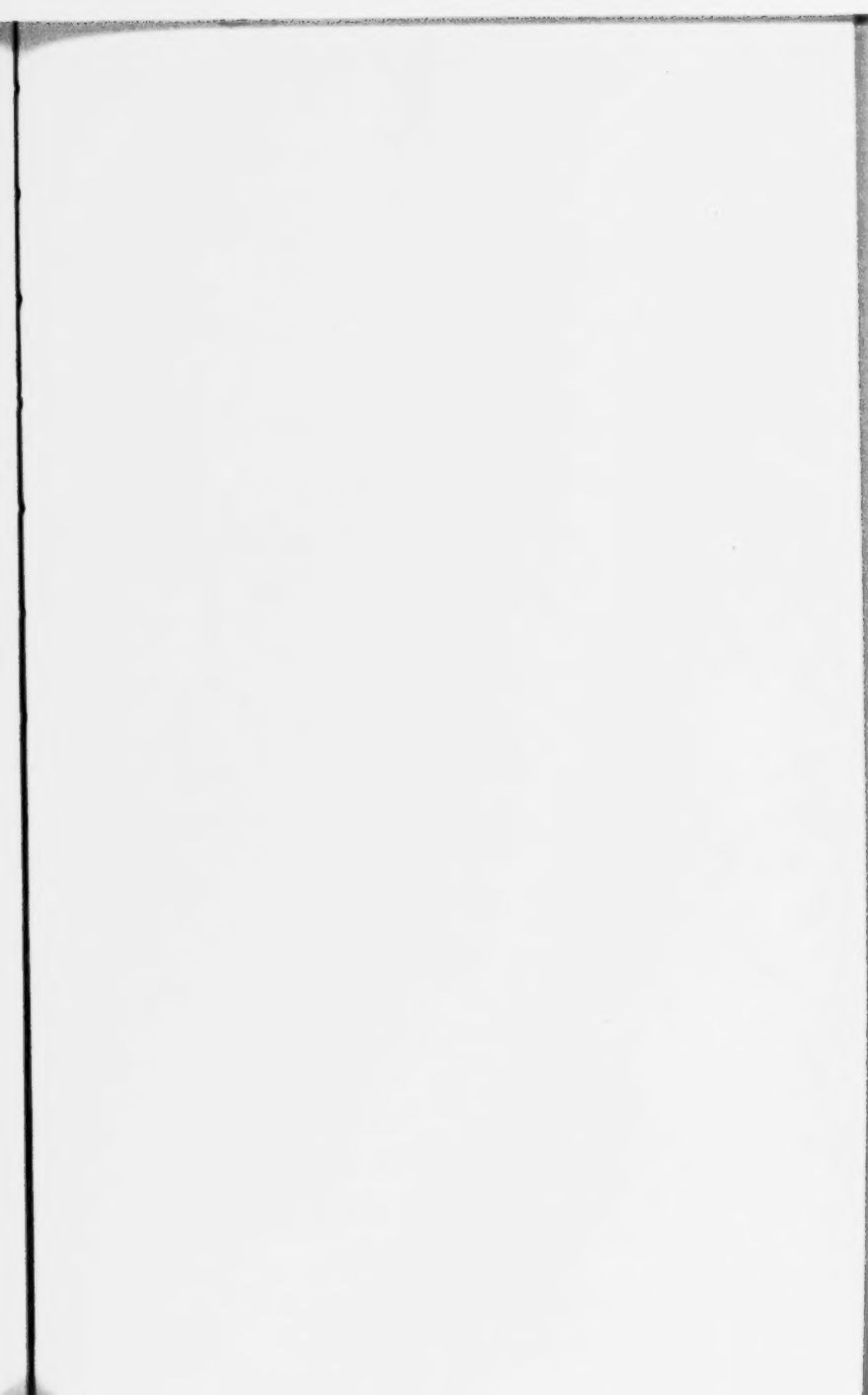
[SEAL]

WM. PARKIN,  
*Clerk of the United States Circuit Court  
of Appeals for the Second Circuit.*

434 United States Court of Appeals, second circuit. Winstead Hosiery Co. v. Federal Trade Commission. Return and certiorari. Office of the Clerk Supreme Court U. S. Received Jun. 27, 1921.

435 File No. 28,288. Supreme Court U. S., October term, 1921. Term No. 333. Federal Trade Commission, petitioner, vs. Winstead Hosiery Company. Writ of certiorari and return. Filed June 27, 1921.







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## AUTHORITIES CITED.

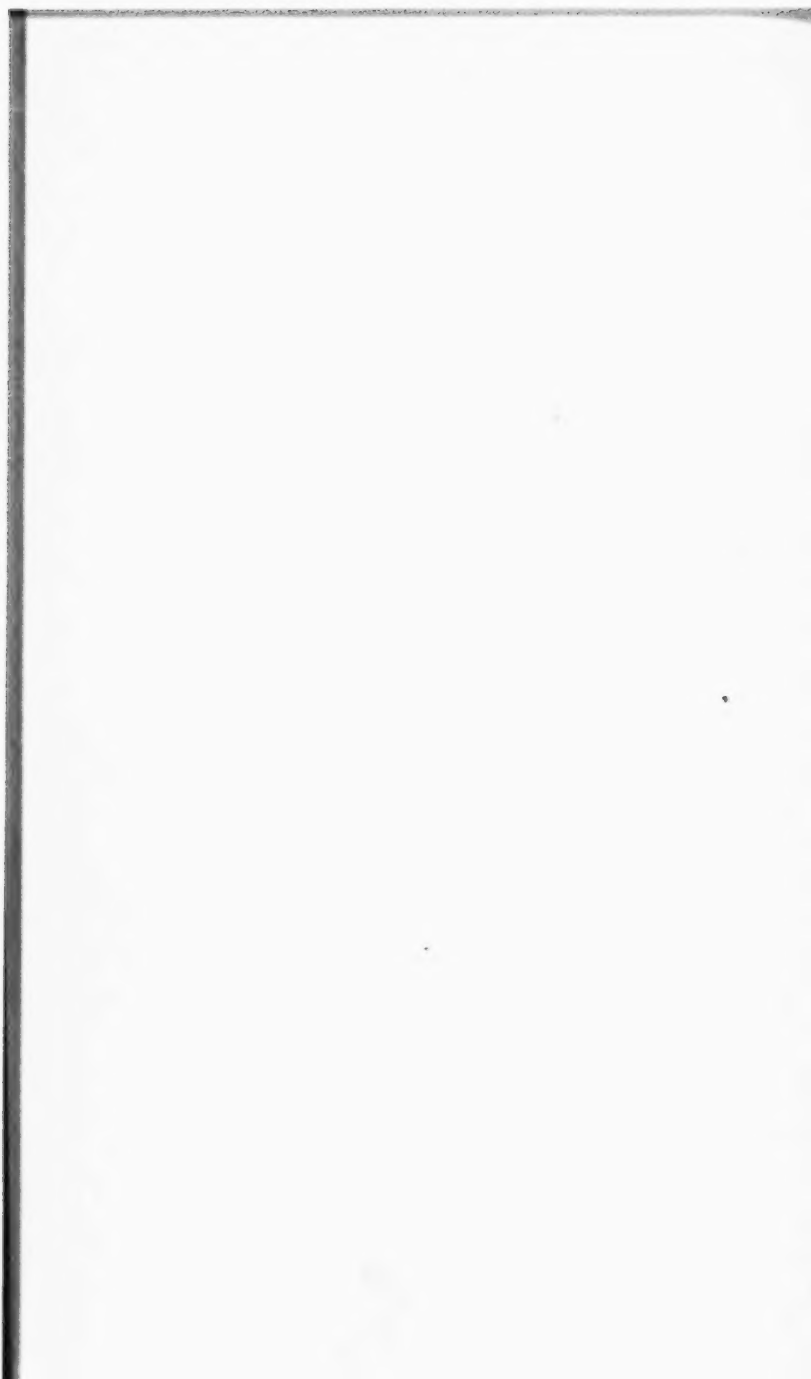
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# In the Supreme Court of the United States

OCTOBER TERM, 1920.

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FEDERAL TRADE COMMISSION, PETITIONER,	} No.
<i>v.</i>	
WINSTED HOSIERY COMPANY, RESPONDENT.	

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

The Solicitor General and the Acting Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on the 23d day of April, 1921, which judgment reversed an order of the Federal Trade Commission, directing respondent to cease labeling its underwear composed of wool and cotton as "merino," "wool," or "worsted" unless the presence of cotton was also indicated.

### THE FACTS.

The Federal Trade Commission filed its complaint against the respondent, calling on it to show cause why it should not be required to desist from labeling underwear of its manufacture composed of a small amount of wool and a large amount of cotton as "merino," "wool," or "worsted."



The respondent admitted the labeling of its product, not wholly wool, as charged; denied the intention or design to mislead, and alleged, as an affirmative defense, that the use of the labels in question by manufacturers throughout the United States had become universal and was well recognized by the distributors of underwear, and that the labels were used in the same way by importers.

After joinder of issue an agreed statement of facts was filed which embodied a statement of this affirmative defense and included also:

That there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as "all wool,"

and that the garments labeled by respondent as alleged,

are not composed wholly of wool, part of the material in said articles being wool and part being cotton, the percentage of wool in said articles varying from twenty to eighty per cent; that the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of said articles of wearing apparel; therefore, such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool when in fact they contain part cotton.

After the agreed statement of facts was filed the Commission made corresponding findings of fact and

its conclusion on which it issued an order to desist.

Thereafter, respondent filed a petition for the review of this order with the Circuit Court of Appeals, Second Circuit. Acting under the provisions of section 5 of its act, the Commission filed a petition with that court for an order authorizing the taking of additional evidence. This was granted, and the new evidence was filed with the court within the time prescribed by its order. With it were filed new findings of fact, based on all the evidence, and a modified order, all in accordance with that portion of section 5, which provides:

*The Commission may modify its findings as to the facts or make new findings, by reason of the additional evidence taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence.*

The new findings made by the Commission covered all the issues and were complete in themselves and wholly superseded the former findings based on the agreed statement of facts. The purpose of taking the evidence was to learn the actual facts as a basis for findings, in lieu of the assumption of facts, untested by proofs, of the agreed statement.

At the opening of the hearing to take new evidence, the respondent offered to accept the Commission's order as to the labels "wool" and "worsted," in accordance with the condemnation of the knit goods

manufacturers' report; but the Commission deemed it best to rest its whole case on actual evidence, since a part of it had been challenged.

These modified and new findings have not been specifically disturbed by the court, but the original stipulation covering the extent of the use of the labels complained of has been taken as the basis of its decision. Thus the court ignored the new findings, based on the evidence, which shows the agreed statement in this respect to be a mistaken assumption of fact.

The findings and the evidence supporting them show that respondent's goods made of cotton and wool and labeled so as to lead consumers to believe they are all wool are sold by it in competition with (1) genuine all-wool goods, which form a substantial proportion of the total product of knit underwear, and (2) cotton-and-wool goods sold without labels representing them as all-wool.

The evidence of these propositions is in much detail, consisting of the testimony of a large number of manufacturers, jobbers, and dealers who make and handle knit underwear, and is summarized in findings 21 to 24 inclusive. (Appendix II.) (Testimony, Rec. fols. 194, 207, 254, 301, 309, 316, 339, 342, 375, 380, 389-90; exhibits 29, 28, 13-24.)

The Court of Appeals simply ignores the findings in question, reverting, by inadvertence or misapprehension of the effect of the new evidence, to an agreed statement superseded under the provision of the statute and the court's order.

As appears from the record, the petition of the respondent here to the Circuit Court of Appeals, to review the original order of the Commission, deals only with the original findings based on the agreed statement of facts, and does not cover the new evidence and findings based thereon, which are part of the proceedings taken subsequent to the filing of the petition.

The agreed statement of facts was entered into in order to expedite the proceeding and save the time and expense of taking proofs, and the particular statement regarding the extent of the use by manufacturers of the labels in question was proposed in behalf of the respondent and accepted for the purpose.

In relying on this agreed statement, the court overlooked completely the manufacturers of genuine all-wool goods with which the respondent's goods are in competition, because labeled so as to lead the public to believe them all wool. (Rec. fols. 254, 339, 832-837, ex. 29.)

The original order and the new order follow the language proposed by the chairman of the committee of the Knit Goods Manufacturers of America, an organization representing the bulk of the industry in this country. That association unanimously adopted, prior to the issuance of the original order herein, a report (see record, Exhibit 9) condemning respondent's labels as "improper," and proposing a comprehensive reform of such misleading labels. That report condemned "wool" and "worsted" and

"natural merino" used on wool-and-cotton underwear as "improper," though it allows the word "merino" alone as "permissive." Respondent's label covering "merino" as set out in the complaint was "natural merino." The report on the subject of labeling referred to was adopted shortly after the complaint was issued.

It is urged that the relation of the Commission to the matters at issue is not that of a party to private litigation, but that of an agency of the Government charged with passing on trade practices and establishing actual facts on which to base its action. The provision of the act for the taking of additional evidence is obviously intended to secure this and prevent a miscarriage by failure of evidence covering essential facts in the case.

The findings as to unfair competition based on the evidence are the findings upon which the Commission's conclusion and order must be reviewed, and the ground which the court has taken for its sweeping conclusion as to the lack of jurisdiction of the Commission does not exist.

The court says:

In this case there was obviously no unfair method of competition as against other manufacturers of underwear.

This is of course untenable if the Commission's findings are accepted. As pointed out, the findings made by reason of the additional evidence are declared by the statute to be conclusive if supported by evidence.

Otherwise the court would be in the position of holding that notwithstanding abundant evidence of unfair competition by respondent toward other manufacturers, the Commission was powerless to prevent the respondent from continuing the practice which defrauded the public and thereby injured its competitors. This would be tantamount to denying the Commission the exercise of its peculiar function plainly indicated by the legislation instituting it.

#### QUESTION PRESENTED.

Does the misbranding by respondent of cotton-and-wool garments, which misleads the consuming public into the belief that such garments are made wholly of wool, thereby injuring competitors who correctly label their products, constitute an unfair method of competition within the purview of section 5 of the Federal Trade Commission act (38 Stat. 717)? The question is plainly of great interest to the public. It is of paramount importance to the Commission because of a large number of cases now before it involving similar charges of misbranding and over which the Commission has assumed jurisdiction.

#### ASSIGNMENTS OF ERROR.

The petition for certiorari should be granted for these reasons:

1. The court erred in holding that there was no unfair method of competition. The holding is not in accord with the decision of this court in *Federal Trade Commission v. Gratz* (253 U. S. 421).

2. There is a conflict of decision respecting the jurisdiction of the Federal Trade Commission between the court below in this case and the decision rendered by the United States Circuit Court of Appeals for the Seventh Circuit in *Scars, Roebuck & Company v. Federal Trade Commission* (258 Fed. 307); and also conflict between various decisions of the Circuit Court of Appeals for the Second Circuit.

3. The court erred in holding that the Federal Trade Commission is without jurisdiction to prevent the use of labels upon commodities transported in interstate commerce that injure competing manufacturers by misleading the consumer, although such labels are understood by the trade.

4. The court ignored findings showing extensive competition between respondent's cotton-and-wool garments with labels signifying all-wool to the consumer and (1) competitors' all-wool underwear with labels identical with respondent's; (2) all-wool and cotton-and-wool garments bearing no descriptive labels; and (3) cotton-and-wool garments with labels correctly describing their composition.

5. The court rests its decision on an agreed statement of facts which is contradicted and superseded by new findings made by the Commission on evidence taken by order of the court pursuant to the statute.

6. The court erred in holding that the testimony "fully established that the trade was not misled in any respect," notwithstanding findings numbers thirteen and fourteen to the contrary, which are supported by testimony.

Wherefore, it is respectfully submitted that certiorari be granted.

WILLIAM L. FRIERSON,  
*Solicitor General.*

ADRIEN F. BUSICK,  
*Acting Chief Counsel, Federal Trade Commission.*



## BRIEF AND ARGUMENT.

### I.

**The court erred in holding that there was no unfair method of competition as against other manufacturers of underwear.**

The Commission's position is that the deception of *consumers* by respondent's labels constitutes an unfair method of competition, because unfairness of competitive methods toward other manufacturers whose labels do not so deceive in the eye of the law is involved necessarily in the fraud on the public, regardless of the deception of the trade, although that appears here to some degree.

Unfair competition does not consist in deception or fraud of one competitor by another. In the analogous case of passing off, the competitor is the one who is not deceived. It is the deception or fraud on the public which *in its effects* constitutes unfair competition. A cause of action to the public does not arise therefrom, under the common law, *but it is only because of such deception* that a private right of action exists.

In *American Washboard Co. v. Saginaw Mfg. Co.* (103 Fed. 281, 285), Mr. Justice Day (then circuit judge) said that:

The true rule was stated by Lord Chancellor Westbury in *Leather Cloth Co. v. American Leather Co.*: "It is, indeed, true, that

unless the mark used by the defendant be applied by him to the same kind of goods as the goods of the plaintiff, and be in itself such that it might be and is mistaken on the market for the trade-mark of the plaintiff, the court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of buyers in the market, under which they, in fact, take defendant's goods as the goods of the plaintiff—that is to say, imposition on the public—becomes the test of the property in the trade-mark having been invaded and injured, and not the ground on which the court rests its jurisdiction."

(*Draper v. Skerrett*, 116 Fed. 206, 209; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. 30, 32-3; *R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.*, 151 Fed. 813.)

Distinctly, the Commission does not contend that this is a case of passing off at common law. On the contrary, the courts would have no jurisdiction of this case between private parties, and it is, therefore, within the peculiar jurisdiction given by Congress to the Federal Trade Commission. But it does contend that the *principles* underlying the unfairness of competition in a case of passing off apply here.

It is difficult from the summary opinion of the Circuit Court of Appeals to fix definitely the grounds on which its decision rests. It ignores findings, supported by evidence, vital to the case, and only by uncertain inference disturbs others, not specifically. It does not disturb the main fact as found, namely, the deception of the public by respondent's labeling.

Aside from such generalities as, "The Commission is not made a censor of commercial morals generally," the most definite statements relating to the facts or law of the case are the following:

In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade.

Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of products.

The latter would seem to include and explain the former.

The distinction between the instant case and the private right of action is, that the effect of unfair competition in the latter case is traced or followed to the injury of the individual. In the case of private injury, the motive is to sell goods by the deception of the public, the selection of a successful competitor's trade-mark, etc., for imitation being taken as the best means of succeeding in the main purpose of deceiving the public.

In the common-law action of unfair competition, or "passing off," or in an action for infringement of trade-mark, the essential element, injury to the complaining competitor, depends entirely on the deception of the consuming public by the competitor

complained of; and if that appears, injury to competitors or unfair competition inevitably follows.

Evidence of the capacity to deceive, or actual deception, by respondent's labels being recognized by the court below in this case, injury to competitors who sell goods such as respondent misrepresents his to be follows logically. The fact that the deception is not as to a unique term or symbol, as an infringement of a trade-mark in which the individual complainant has an exclusive right, or that the injury and damage is not traced to an individual, as in "passing off," but to a class, does not make the injury of a different nature or change the vice of the practice. It only differentiates the case respecting a definite individual injury and damage, on which the competitor's private right of action for injury to property and his remedy depend.

**The evidence of the public's deception.**

Respecting the public's being misled by respondent's labels, the court below says:

Assuming that some consumers are misled because they do not understand the trade signification of the labels, or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of products. Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is, in our opinion, not within the province of the Federal Trade Commission to do so.

Not only this sweeping statement as to the dissociation of deceitful labeling from unfair competition can not stand on any conception of competition which contemplates the actual injury to competitors and public, but the testimony of manufacturers and others shows that the unfairness of the competition is recognized, though naturally not confessed, by those who practice it. (Rec. fols. 341-2, 469.)

The evidence supplies instances of manufacturers and retailers who, to escape complicity in the deception of the labels used by respondent, repudiate absolutely the use of the words "merino," "wool," and "worsted" on cotton-and-wool underwear. Among such dealers are Wanamaker's, Altman's, and Rogers, Peet & Company, of New York. (Rec. fols. 288, 296, 400, 907.)

The court's statement that

Some witnesses testified that, in their opinion, some part of the consuming public was, or might be, misled into thinking that the underwear so described was pure wool,

is a very inadequate indication of the evidence on this subject. It overlooks entirely the direct statements of consumers, consisting of the testimony of some eighteen representatives of the purchasing public, who testified to such understanding (Rec. fols. 256-266, 283-309), and the responses (approximately 200) to questionnaires sent to numerous persons in seven cities, most of whose names were taken at random from telephone directories. Of these, approximately two-thirds gave "all wool" as their understanding of

"merino" as applied to underwear. As to "wool," the preponderance of this understanding was much greater, and as to "worsted" somewhat less. (Exhibits 25 and 26.) The action of leading dealers in repudiating the use of the labels in question because of their misleading character is rejected by the court, to say nothing of the evidence of dictionary definitions.

**Trade subject to deception.**

The Commission contends that, under its act, the deception of intermediate distributing members of the trade is not essential to a charge of an unfair method of competition by manufacturers, based on deception of consumers. However, there were definite findings based on definite evidence that some in the trade were deceived. These findings were:

13. Some buyers for retailers and sales people understand the words "merino," "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino," as applied to underwear, to indicate all-wool underwear.

14. Some retailers and their salesmen rely on the labels on the boxes in which they sell underwear, including respondent's such as "merino," "natural worsted," "Australian wool," and "gray merino," and use them to sell underwear under such labels as all-wool. (Rec. fols. 351, 352, 509, 531.)

In stating that the testimony taken "fully established that the trade was not misled in any respect by the label complained of" the court dismisses the above findings without consideration.

**Opposed to good morals.**

This court has pointed out in *Federal Trade Commission v. Gratz et al.* (253 U. S. 421, 427), that there are two general classes of subjects of this act: (1) Trade practices opposed to good morals, because characterized by deception, etc.; and (2) those having a dangerous tendency unduly to hinder competition or create a monopoly.

It is clear that deception, by which one class of goods is substituted for another in sales to the public, so that a manufacturer causing the deception benefits thereby, his goods displacing another's, not only tends to "fetter free and fair competition as commonly understood and practiced by honorable opponents in trade," in the language of Mr. Justice McReynolds, but is opposed to good morals.

This does not involve the Commission's assuming the function of a "censor of commercial morals generally." It constitutes a specific case within its peculiar jurisdiction.

**Hinders competition.**

The court's conclusion that "there was obviously no unfair method of competition as against other manufacturers of underwear" must be based on the assumption, unwarranted by the evidence and findings, that all manufacturers of the kind of underwear made by respondent were using the same false labels.

But that would only aggravate the unfair competition thus presented with the genuine all-wool

product; and it would also be potential unfair competition toward all who might enter the field of manufacturing cotton-and-wool underwear put out under truthful labels.

If the scope of this Commission's law is to prevent unfair methods of competition, how could it stop at a situation where unfair competition was inevitable although theoretically, for a moment, it might be absent because of the universal adoption of what otherwise would be an unfair method?

**Manufacturers responsible for deception.**

The law recognizes that the manufacturer is responsible for deception of the ultimate consumer, although his relations may be only with the jobber or retailer, and they are not deceived. This fairly represents the principle governing the interests of society in the matter of preventing unfair methods of competition.

Assuming that the manufacturers were innocent of wilful deception in the matter, the law holds them none the less responsible for the results to the public. Since they are, as a fact, the actors in putting out the misleading labels and setting in motion the train of transactions which results in deception, they are the source of the deception and the place where logically the ensuing unfair practice can alone be prevented. (Nims on Unfair Competition, secs. 381 and 358, and cases cited; *Thum Co. v. Dickinson*, 245 Fed. 609-13; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 155.)



**The Federal Trade Commission act supplies the legislation indicated by the courts for this class of cases.**

In *American Washboard Company v. Saginaw Manufacturing Company*, *supra*, where complainant, a manufacturer of aluminum-faced washboards upon which the word "aluminum" was used, complained of the defendant's manufacture of washboards on whose face the same words appeared, though the board was not, in fact, made of such metal, claiming that the public was thereby deceived into buying it as a genuine aluminum washboard, Mr. Justice Day (then circuit justice) in affirming a dismissal of the bill said:

It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises. \* \* \* It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and *for which the legislature*, and not the courts, must provide a remedy. \* \* \*

There is a widespread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose

goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, *the remedy must come from the legislature* and not from the courts. (Italics ours.)

The United States Circuit Court of Appeals for the Third Circuit recognized the peculiar jurisdiction of this Commission in deciding *Armstrong Cork Company v. Ringwalt Linoleum Works* (240 Fed. 1022). That case originated in the United States District Court for New Jersey, where the Armstrong Company, manufacturers of oilcloths, filed a bill to enjoin the linoleum works from using the term "linoleum" on its products on the ground that it was composed of inferior materials, not satisfying the definition of "linoleum."

In reversing District Judge Rellstab, who sustained a demurrer to the bill because "a right of action of the kind here pressed lies only when a property right has been invaded," the Circuit Court of Appeals said:

Per curiam: This is an appeal from a decree dismissing the plaintiffs' bill in pursuance of an opinion reported at (D. C.) 235 Fed. 485. In view of the important and far-reaching commercial questions raised in this case we feel that they can better be approached and decided in this court after full proofs and final hearing. Following our usual course in such a situation, we express no present opinion on these questions and confine ourselves to reversing the order made below, dismissing the

bill, and remand the case with directions to reinstate the bill, overruling the demurrer, without prejudice to raising the same questions on final hearing, and to proceed to final hearing. *We might add that in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission, this order is made without prejudice to the rights of the parties, while this appeal is pending, to apply for relief to that body if it is so desires. (Italics ours).*

The suggestion of the Circuit Court of Appeals was taken, and application made by the plaintiffs to this Commission, and a complaint against the Ringwalt Linoleum Works was issued. Evidence was then introduced on behalf of the Commission and an order entered May 27, 1919, directing the Ringwalt Linoleum Works to cease using the word "linoleum" except on certain compositions. No appeal from this order has been filed in the Circuit Court of Appeals. It has apparently superseded any further proceedings in the original action.

## II.

### **The court erred in ignoring the findings.**

The court recites as the basis of fact for its conclusion, a part of an agreed statement of facts adopted before any evidence was taken, and superseded by findings directly contradictory, made and submitted to the court by the Commission upon evidence taken pursuant to its order. Section 5 provides that when additional evidence has been taken pursuant to its provisions,

The Commission may *modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken*, and it shall file such modified or new findings *which, if supported by testimony, shall be conclusive*, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence.

New findings covering the entire case, and showing elaborately the labels used by competing manufacturers generally, were made and submitted with the evidence taken. The evidence supporting them is definite, abundant, and uncontradicted.

These findings show:

(1) That respondent sells its products made of cotton and wool under labels signifying to the public all wool, in competition with manufacturers of all-wool underwear, sold under like labels, whose product forms a substantial proportion of the total product of all-wool and cotton-and-wool underwear; the same competition exists with imported all-wool underwear.

This vital field of competition the court appears wholly to ignore.

(2) That respondent sells its products made of cotton and wool under labels signifying to the public all wool, in competition with manufacturers of cotton-and-wool underwear, which carry no labels descriptive of their composition (making no representations), and others marked and sold as cotton and wool, domestic and imported. (See findings 21 to 24, Appendix II.)

The substance of the respondent's defense was set out in the following paragraph of its answer:

That respondent did not create or originate the aforesaid custom or practice, but has been following the same in competition with and in like manner as followed by other underwear manufacturers throughout the United States as well as underwear imported from foreign countries; that the following are the names of some of the said manufacturers of underwear in the United States, namely:

Then follow the names of thirty-two manufacturers of mixed-cotton-and-wool garments, a very small fraction of the industry in this country.

The testimony of Mr. Lincoln C. Cromwell, chairman of the American Manufacturers' Association's committee on labeling, as to that list of manufacturers representing the practice in the industry is clearly in the negative. Regarding the use of labels in the industry, as shown by the committee's report, he testified that he had prepared the report and was familiar with the particular labels referred to in the report and used by respondent and that other mills use no descriptive labels. (Rec., fols. 845-847.)

### III.

#### **Conflict of decisions.**

The court in its decision seems to have lost sight of the purpose of the Trade Commission act in the protection of the public's interest by enjoining the practices resulting in its deception, involving unfair

competition; yet that is the feature of the act which the court in other circuits has emphasized, and whose importance this circuit has seemed in previous opinions to confirm.

In its opinion in the case at bar the court says:

In this case there was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade, nor any attempt to establish a monopoly. Manifestly, no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition, or for an injunction or damages under the antitrust acts.

The Circuit Court of Appeals in the Seventh Circuit held in the *Sears, Roebuck* case (258 Fed. 307, 311) that:

On the face of this statute, the legislative intent is apparent. The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners, representing the Government as *parens patriæ* are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors, directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases.

In *Federal Trade Commission v. Gratz* (258 Fed. 314, 318), commenting on the *Sears-Roebuck* case, the court in the Second Circuit said:

The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

In the instant case, the practice charged may be regarded as false advertising containing false and misleading statements deceptive to all purchasers and injuring competitors.

Furthermore, there appear to be inconsistencies between expressions of the court in the case at bar and its decision in *New Jersey Asbestos Co. v. Federal Trade Commission* (264 Fed. 509) and *Federal Trade Commission v. Gratz* (258 Fed. 314, 316, 318). In the *Asbestos* case the court says:

The payment of money or the giving of valuable presents to an employee to induce him to influence his employer to make a contract of purchase is a fraud justifying the employee within his contract of service and perhaps the recovery by the purchaser of the amount or value of such inducement from the seller upon the theory that it must have been included in the price. But even in such a case we think it would be a matter between individuals and not one so affecting the public as to be within the jurisdiction of the Commission under our decision in the *Gratz* case.

In the *Gratz* decision the court said:

It seems to us that unfair methods of competition between individuals are not contemplated by the act. \* \* \* No authority is given to any individual to present his grievance and the Commission is to interfere only in the interest of the public.

In the present case the court apparently assigns as reason why the practice is not within the purview of the statute, that it is not a case between individuals, saying:

In this case there was no passing off of a competitor's goods for those of another manufacturer. Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition. \* \* \*

Finally, the construction placed upon the act by the court below, when all of its decisions prior to that in the present case are considered together, appears to be in conflict with the construction here sought to be reviewed.

The principal charge in the *Sears-Roebuck* case was for false statements in the respondent's advertising both respecting the respondent's own goods and claimed superior methods of business and, by inference, respecting the honesty of competitors and the quality of their goods. The Court of Appeals for the Second Circuit approves the decision of the Seventh Circuit on the ground that the advertising was calculated to deceive all purchasers and to discredit all competitors:



It was clearly a method unfair to the public generally.

Again, in the *Asbestos* case the court said:

We have held in the *Gratz* case (258 Fed. 314) that only unfair practices which affect the public, as distinguished from individuals, are within the jurisdiction of the Commission.

In the *Gratz* case (258 Fed. 314) the court said:

We think the unfair methods though not restricted to such as violate the antitrust acts must be at least such as are unfair to the public generally. It seems to us that section 5 is intended as a method to prevent practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the antitrust acts.

These expressions of the court below respecting the proper construction of the Trade Commission act when read together in the light of the facts involved in the cases would appear to justify the conclusion that methods of competition deceptive of the general public and injuring competitors generally, or as a class, are within the prohibition of the act. Yet in the instant case where these elements were clearly present the court holds that the act was not violated. In the closing sentences of the decision the court holds that cases of misbranding and misdescription are not covered by the act regardless of their effect on the public or on competitors.

## IV.

**Great public interest.**

It is apparent that the public has great interest in the subject of the misbranding of commodities generally, as the consumer is aroused by the abuse of his confidence by false labels. That is peculiarly true in this case where it appears as a fact that ultimate consumers interpret labels upon mixed cotton and wool goods to mean all wool. Moreover, the consensus of opinion of the knit goods industry that the labels affected by this proceeding may mislead (findings 26 and 27) is added reason for the public's interest in the result of the Commission's effort to stop misbranding in interstate commerce.

**CONCLUSION.**

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit be granted.

WILLIAM L. FRIERSON,  
*Solicitor General.*

ADRIEN F. BUSICK,  
*Acting Chief Counsel for  
Federal Trade Commission.*

## APPENDIX I.

### OPINION OF COURT BELOW.

Before Ward, Hough, and Manton, circuit judges.  
Wood, Molloy & France, for petitioner. M. J.  
France, of counsel.

J. T. Clark and M. Farrington, for respondent.

WARD, Circuit Judge:

October 30, 1918, the Federal Trade Commission issued a complaint against the Winsted Company for a violation of section 5 of the act of September 26, 1914, it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public:

The particular charge was made:

Paragraph three: That for more than one year last past the respondent, Winsted Hosiery Company, with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has, in the conduct of its business manufactured and sold in commerce aforesaid, and labeled, advertised, and branded certain lines of underwear composed of but a small amount of wool as "men's natural merino shirts," "men's gray wool shirts," "men's natural wool shirts," "men's natural worsted shirts," "Australian wool shirts."

That such advertisements, brands, and labels are false and misleading and calculated and designed to, and do deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool.

The answer of the defendant set up among other things:

Paragraph two: Denies each and every allegation in paragraph marked "Paragraph

third" of the complaint herein, except that the respondent admits that for more than one year last past it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labeled, advertised, and branded certain lines of underwear as "men's natural merino shirts," "men's gray wool shirts," "men's natural worsted shirts," "Australian wool shirts," "men's natural wool shirts"; and respondent further admits that such underwear so manufactured and made are not composed wholly of wool.

For a further and separate defense to the complaint herein, respondent alleges as follows:

Paragraph third: That for the past twenty years and at the present time, it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as "natural merino," "wool," "natural wool," "natural worsted," and "Australian wool," when such underwear so described is not composed wholly of wool, but on the contrary are composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear, to meet the varying demands of the trade solicited and served; and further, that said general custom and practice has been and now is universal in the underwear trade throughout the United States and has been followed by all the manufacturers engaged therein; and further, that said general custom and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States.

For the purpose of expediting the proceeding and of avoiding the time and expense incident to a hear-

ing, a statement of facts was agreed upon which contains among other things:

Paragraph seven: That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as "natural merino," "wool," "natural wool," "natural worsted," and "Australian wool," when in fact such underwear so described is not composed wholly of wool and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served; that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as "all wool"; that large quantities of underwear and similar wearing apparel have been imported into the United States from foreign countries and it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, branded, and advertised as "wool," "merino," and "worsted" underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but, on the contrary, is composed partly of wool in varying percentages.

The Commission filed its conclusion of law as follows:

From the foregoing findings the Commission concludes that the method of competition set

forth is, under the circumstances set forth, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

And issued its order to cease and desist, as follows:

Now, therefore, it is ordered, that the respondent, Winsted Hosiery Company, its officers, agents, representatives, servants and employees cease and desist from directly or indirectly employing or using the labels and brands "wool," "merino" and "worsted," or any similar descriptive brands and labels on underwear, socks or other knit goods composed partly of wool, except either (1) when a knit fabric is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric (e. g., wool-and-cotton; worsted-and-cotton; wool worsted-merino and cotton; worsted, cotton, and artificial silk).

Respondent is further ordered to file a report in writing with the Commission 3 months from notice hereof stating in detail the manner in which this order has been complied with and conformed to.

March, 1920, the Winsted Company filed its petition in this court to set aside the order.

Thereupon the Commission applied for permission to take additional evidence under section 5 of the act, which was granted. A great deal of testimony was taken by the Commission which fully established that the trade was not misled in any respect by the label complained of. But some witnesses testified that in their opinion some part of the consuming public was or might be misled into thinking the underwear so described was pure wool.

January 14, 1921, the following modification of its original order to cease and desist was issued by the Commission:

This proceeding having been heard by the Federal Trade Commission upon complaint of the Commission, the answer of the respondent, the statement of facts, agreed upon by counsel for the Commission and respondent, and upon the additional evidence taken for the Commission under an order of the United States Circuit Court of Appeals for the Second Circuit, dated October 18, 1920, and the Commission having, by reason of such additional evidence, modified some of its original findings and adopted new findings as to the facts and adopted its conclusion, that the respondent has violated the provisions of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," it now recommends the following modification of its original order to cease and desist herein, dated January 20, 1920:

It is now ordered that the respondent, the Winsted Hosiery Company, its officers, agents, representatives, servants, and employees, do cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the word "merino," "wool," or "worsted," alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g., "merino, wool, and cotton"; "wool and cotton"; "worsted, wool and cotton"; "wool, cotton, and silk.") or by

a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g., part wool).

Respondent is further ordered to file a report in writing with the Commission three months from notice hereof, stating in detail the manner in which this order has been complied with and conformed to.

The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public. And if such method of competition is prohibited by the act to issue an order requiring the person or corporation to cease and desist from doing so. We have heretofore so understood the extent of the Commission's authority in *Federal Trade Commission v. Gratz* (258 Fed. Rep. 314, affirmed 253 U. S., 421) and *New Jersey Asbestos Co. v. Federal Trade Commission* (264 Fed. Rep. 509).

In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly. Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition or for an injunction or damages under the antitrust acts. Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other mis-



description or misbranding of products. Conscientious manufacturers may prefer not to use a label which is capable of misleading and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so.

The order is reversed.

## APPENDIX II.

### COMMISSION'S FINAL REPORT AND FINDINGS BASED ON EVIDENCE TAKEN UNDER ORDER OF THE COURT.

United States Circuit Court of Appeals for the  
Second Circuit. *Winsted Hosiery Company, peti-  
tioner, v. Federal Trade Commission, respondent.*

The petitioner, Winsted Hosiery Company, having filed in this court, under the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," a written petition for review of an order issued by the Federal Trade Commission, the respondent herein, directing the petitioner to cease and desist from the use of certain labels on underwear manufactured by it, and the Federal Trade Commission, under another provision of said act, having applied to this court for leave to adduce additional evidence and such leave having been granted by an order dated October 18, 1920, as follows: "A motion having been made herein by counsel for the respondent to remand this proceeding for the purpose of taking further testimony. Upon consideration thereof it is ordered that said motion be and hereby is granted, the respondent to have 90 days from the date hereof within which to take such evidence"; and additional evidence having been taken by respondent in pursuance of said order, now the respondent, the Federal Trade Commission, makes return of such additional evidence to this court and files therewith its modified and new findings

of facts and its recommendation for the modification of its original order, as hereto attached.

By the Commission:

[SEAL.]

HUSTON THOMPSON,

*Chairman.*

Dated this 14th day of January, A. D., 1921.

Attest:

J. P. YODER,

*Secretary.*

REPORT AND MODIFIED AND NEW FINDINGS AS TO THE  
FACTS AND CONCLUSIONS.

United States of America, before Federal Trade Commission, ss. At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of January, A. D. 1921.

Present: Huston Thompson, chairman, Nelson B. Gaskill, Jno. Garland Pollard, Victor Murdock, commissioners.

*Federal Trade Commission v. Winsted Hosiery Company.* Docket No. 214.

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondent charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondent having entered its appearance by its attorney, and filed its answer herein, a statement of facts was agreed upon by counsel for the Commission and for the respondent, to be taken in lieu of evidence, and findings of fact and conclusion were thereupon adopted by the Commission and an order

made thereon, dated January 29, 1920, that the respondent cease and desist from using certain labels alleged in the complaint herein, except as provided in said order; thereafter the respondent, by its attorneys, filed with the United States Circuit Court of Appeals, Second Circuit, a petition to review said order as provided by law, and notice of the same was duly served upon the Commission; thereafter application was made on behalf of the Commission to the said court for permission to take additional evidence, under the provisions of section 5 of the act of Congress, approved September 26, 1914, and by an order dated October 18, 1920, the motion was granted and ninety days was allowed within which to take such evidence; such additional evidence thereafter having been introduced in support of the allegations of said complaint before Mr. James McKeag, an examiner of the Federal Trade Commission, theretofore duly appointed, and an opportunity having been given to the respondent to introduce evidence on its behalf, and respondent, by its attorney, having rested without the taking of evidence.

Now, in accordance with the provisions of section 5 of the act of Congress approved September 26, 1914, the Commission having duly considered the record, and being now fully advised in the premises, modifies its findings as to the facts, as previously adopted, and makes new findings by reason of the additional evidence, constituting all its findings of facts herein, as follows:

#### FINDINGS AS TO THE FACTS.

Paragraph one: The respondent, Winsted Hosiery Company, is and has been for the last twenty years, a corporation duly incorporated under the laws of

the State of Connecticut and is and has been during that time engaged in the manufacture of knit underwear, shirts and drawers, and hosiery, having its principal place of business and factory at Winsted, Connecticut, and a branch factory at Norfolk, Connecticut, and one at Unionville, Connecticut; the respondent for more than ten years has sold, and now sells, its product of knit underwear, including men's shirts and drawers, throughout various States of the United States and has conducted its business of manufacture and sale as above described in competition with other persons, firms, and corporations similarly engaged.

Paragraph two: The respondent in the conduct of its business, as stated in paragraph one, has for more than ten years prior to October 30, 1918, the date of the issuance of the complaint herein, sold and shipped its products, namely, knit underwear, to purchasers thereof located in different States of the United States; and during the time named there has been a constant trade and commerce in such products between and among various States of the United States. For the three years prior to October 31, 1918, the respondent's sales of its products of knit underwear aggregated \$2,500,000.

Paragraph three: Respondent admits by its answer that for more than one year prior to January, 1919, it has in the conduct of its business manufactured and sold in commerce (as set forth in the complaint herein) and labeled, advertised, and branded certain lines of underwear as "Men's natural merino shirts," "Men's gray wool shirts," "Men's natural worsted shirts," "Australian wool shirts," and "Men's natural wool shirts," and that such underwear is not composed wholly of wool.

Paragraph four: The methods employed by the respondent in labeling, advertising, and branding its product are effective to carry both to the retailer and the ultimate consumer thereof, the representation that such garments were composed wholly of wool, and in the absence of technical knowledge in either the retailer or the consumer tended to create the belief that such garments were in fact wholly composed of wool.

Paragraph five: During the period of more than five years prior to October 30, 1918, labels bearing the various legends set out in paragraph three have been pasted on or attached by respondent to the boxes in which it sold and delivered to its customers underwear manufactured by it; said labels also bore respondent's trade mark, consisting of the words "Winsted Hosiery Company" in a circle.

Paragraph six: The underwear so labeled, advertised, and sold, as set forth in paragraphs three and five, was not composed wholly of wool, being part wool and part cotton, the percentage of wool therein varying generally from 25 per cent to 80 per cent, and in some cases being as low as 10 per cent; as a rule, for the underwear containing 50 per cent or less of wool, respondent has used labels containing the word "merino," and on those containing more than 50 per cent of wool labels containing the word "wool."

Paragraph seven: The percentage of wool in the underwear manufactured by respondent and sold under the labels stated above varied from time to time according to the relative cost of wool and cotton and according to the loss in the process of fulling, the latter extending to 5 per cent. Respondent has not put any all-wool underwear on the market for a good many years.

Paragraph eight: Respondent sells its product of underwear to retailers.

Paragraph nine: Respondent's boxes containing its underwear, labeled as set forth in paragraph three, have been customarily placed by purchasers, namely, retailers, on their shelves, exposing said labels to the view of their customers, and retailers and their salesmen have sold the contents from the boxes so labeled to the public.

Paragraph ten: The word "merino" means primarily and popularly a breed of sheep whose fleece is a fine long-staple wool, and as applied to wool it signifies the fleece of that sheep or a grade corresponding to it in quality. It is so used commercially in the wool trade and commands the highest price.

The noun "wool" means the fleece or coat of the domesticated sheep, and as an adjective the word means "made of wool."

"Worsted" means primarily and popularly a yarn or fabric made wholly of wool.

"Australian wool" means primarily and popularly wool grown in Australia and is a distinct commodity in the wool and yarn markets, and is known generally as a fine grade of wool.

Paragraph eleven: The merino sheep, meaning a sheep of the merino blood, has been celebrated for centuries in Europe for its fine wool, and was imported into this country early in the nineteenth century, and has been conserved and bred here ever since and recognized as the sheep producing the highest grade of fine wool. It has existed and now exists in large numbers in various parts of this country.

The classification or grading of wool in the wool market is based on the standard of the wool of the merino sheep, the terms "fine," " $\frac{3}{4}$  blood," "half-blood," etc., as grades of wool, referring primarily to full-blood, three-fourths, and one-half blood, respectively, of the merino breed.

Paragraph twelve: A substantial part of the consuming public understand the words "merino," "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino" as applied to underwear to indicate all-wool underwear.

Paragraph thirteen: Some buyers for retailers and sales people understand the words "merino," "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino," as applied to underwear to indicate all-wool underwear.

Paragraph fourteen: Some retailers and their salesmen rely on the labels on the boxes in which they sell their underwear, including respondent's, such as "merino," "natural worsted," "Australian wool," and "gray merino," and use them to sell underwear under such labels as all-wool.

Paragraph fifteen: The labels "merino," "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino" used on garments composed partly of wool and partly of cotton, or their containers, tend to encourage and aid representations to consumers by ignorant or unscrupulous retailers and salesmen that the underwear so labeled is all wool. The pay of retail salesmen of underwear often depends in part on the amount of their sales.



Paragraph sixteen: The labels "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino," as used by respondent for its underwear composed partly of wool and partly of cotton, or on the containers, are calculated to, and do mislead a substantial part of the purchasing public to believe that the garments sold under such labels are all wool.

Paragraph seventeen: The words "merino," "wool," and "worsted," as used by respondent in labels applied to their product of knit underwear, severally tend to and do mislead a substantial part of the consuming public to believe that they indicate all-wool garments, and into purchasing in that belief.

Paragraph eighteen: The respondent makes and uses "wool-spun" yarns, composed of cotton and wool, in the underwear manufactured and sold by it under the labels as stated in paragraph sixteen, which make a soft, woolly fabric and tend to cause the purchasing public to believe that it is all wool.

Paragraph nineteen: The terms "merino," "natural merino," and "natural wool" have been for many years used by some manufacturers as labels for underwear made entirely of cotton. The sales people of retailers can not tell from their own examination the proportions of wool and cotton in knit underwear composed partly of wool and partly of cotton.

Paragraph twenty: The word "merino" is used by manufacturers of yarn and knit underwear and largely by jobbers and retailers as a trade term meaning a combination of cotton and wool. Yarns made partly of cotton and partly of wool fibers and known in the terminology of the trade as "merino" yarns are sold and billed by yarn manufacturers to underwear manufacturers as containing definitely stated per-

centages of cotton and wool. The term "merino" when applied in the retail trade to underwear composed partly of wool and partly of cotton is used regardless of the percentages of wool and cotton and has no definite meaning.

Paragraph twenty-one: All-wool knit underwear has been widely manufactured and sold in this country for twenty years or more under various labels, such as "All-wool," "Wool," "Natural wool," "Random wool," and "Pure wool," and under trade-mark brands without any words descriptive of the composition thereof. All-wool knit underwear of domestic manufacture has constituted a substantial proportion of the total product of all-wool and wool-and-cotton underwear. According to the census of 1914, for manufactures of textiles, the latest available, the amount of all-wool knit underwear, namely, shirts and drawers, as compared with the output of such underwear made partly of cotton and partly of wool, was for the year 1914, in quantity—that is, by dozens—373,045 dozens to 1,434,504 dozens, and in value \$3,448,575 to \$9,228,686, or 20 per cent approximately in quantity and 27 per cent in value of the entire product of underwear in this country composed of wool in whole or in part.

Paragraph twenty-two: All-wool knit underwear has been imported for sale into this country by various retail dealers for twenty years or more, has been sold under various labels such as "All-wool," "Wool," "Natural wool," "Pure wool," "Lamb's wool," and under trade-marks, e. g., "Demophilo," "Two Steeples," and some has been so imported and sold without any label indicating its composition. Knit underwear has been imported for sale into this country for twenty years or more, composed of

various percentages of cotton and wool, under the labels "Cotton and wool," "Cotton and wool mixed," "Gauze merino," "Wool and cotton" or "Cotton and wool," according to whether the percentage of wool or cotton present was greater or less.

Paragraph twenty-three: The knit underwear manufactured in this country consisting of cotton and wool in various percentages has been sold for ten years or more under a variety of labels differing from respondent's as set out in paragraph three; a large number of the total output of such garments have been made and sold by manufacturers without any label or marking describing the materials or fibers of which they are composed, such as cotton and wool, but under the private trade-mark or brand of the manufacturer or retailer alone. Manufacturers of knit underwear made partly of cotton and partly of wool have been accustomed to sell their underwear under labels in the form and language requested by their customers, and such labels include both trade-marks or brands without descriptive words and terms, such as "fine" and "superior" in combination with the word "underwear," without words descriptive of the composition, and fancy or coined names. Such underwear has also been sold under the labels "cotton and wool" and "part wool."

Paragraph twenty-four: Knit underwear composed partly of cotton and partly of wool, under the labels "Natural merino," "Natural wool," "Gray wool," "Natural worsted," "Australian wool," and "Gray merino," has been sold by respondent in competition with underwear manufactured wholly of wool, imported and domestic, and manufactured and sold under labels indicating that fact, or under some of the labels named above in this paragraph, or under

private trade-marks or brands alone, without descriptive terms, and in competition with knit underwear composed partly of cotton and partly of wool, imported or domestic, manufactured and sold under labels indicating such composition or under trade-marks or brands alone, without descriptive terms or under labels bearing fancy or coined names.

Paragraph twenty-five: Some retailers have ceased the use of "merino" on underwear made partly of cotton and partly of wool since before the beginning of this proceeding, because of its uncertain, ambiguous, and misleading meaning to the public.

Paragraph twenty-six: It is the sense of the underwear industry as expressed by the American Knit Goods Manufacturers, an organization representing approximately 75 per cent of manufacturers in this country of the class of knit underwear manufactured by respondent, that the use on knit underwear composed partly of wool and partly of cotton of the words "wool underwear," "worsted underwear," "natural wool underwear," "Australian wool underwear," and "natural merino," among others, are "improper," and the words "wool and cotton" are recommended by said association for use as labels on underwear made partly of wool and partly of cotton, and the said organization has by official action requested its members to drop the use of the word "merino" as a label on underwear made of cotton and wool unless followed by the words "wool and cotton."

Paragraph twenty-seven: It is the sense of retailers as expressed by the board of directors of the National Association of Retail Clothiers that the terms (1) "natural merino," (2) "gray wool," (3) "natural wool," (4) "natural worsted," (5) "Austra-

lian wool," used as a brand or name on underwear that contained cotton or other adulterant than wool, or on the box containing such underwear, might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated and that such misleading terms should not be used.

Paragraph twenty-eight: Respondent has continuously up to the present time manufactured and sold knit underwear under the labels set out in paragraph three, and the proportions of wool and cotton therein have not differed materially from those stated in paragraph six.

#### CONCLUSION.

The practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

[SEAL.]

HUSTON THOMPSON,  
*Chairman.*

Dated this 14th day of January, A. D. 1921.

Attest:

J. P. YODER,  
*Secretary.*

RECOMMENDED MODIFIED ORDER TO CEASE AND  
DESIST.

United States of America before Federal Trade Commission, ss. At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 14th day of January, A. D. 1921.

Present: Huston Thompson, chairman, Nelson B. Gaskill, Jno. Garland Pollard, Victor Murdock, Commissioners.

*Federal Trade Commission v. Winsted Hosiery Company.* Docket No. 214.

This proceeding having been heard by the Federal Trade Commission upon complaint of the Commission, the answer of the respondent, the statement of facts agreed upon by counsel for the Commission and respondent, and upon the additional evidence taken for the Commission under an order of the United States Circuit Court of Appeals for the Second Circuit, dated October 18, 1920, and the Commission having, by reason of such additional evidence, modified some of its original findings and adopted new findings as to the facts and adopted its conclusion, that the respondent has violated the provisions of the act of Congress approved September 26, 1914, entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," it now recommends the following modification of its original order to cease and desist herein, dated January 20, 1920:

It is now ordered that the respondent, the Winsted Hosiery Company, its officers, agents, representatives, servants and employees, do cease and desist from employing or using as labels or brands on under-

wear or other knit goods not composed wholly of wool, or on the wrappers, boxes or other containers in which they are delivered to customers, the word "merino," "wool," or "worsted," alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (e. g. "merino, wool, and cotton"; "wool and cotton," "worsted, wool, and cotton"; "wool, cotton, and silk"), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (e. g. part wool).

Respondent is further ordered to file a report in writing with the Commission three months from notice hereof, stating in detail the manner in which this order has been complied with and conformed to.

By the Commission.

[SEAL.]

J. P. YODER,  
*Secretary.*

( )

Office Supreme Court, U. S.

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CLERK

**Supreme Court of the United States**

No. ~~881~~ 333

OCTOBER TERM, 1920

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FEDERAL TRADE COMMISSION,

*Petitioner,*  
against

WINSTED HOSIERY COMPANY,

*Respondent.*

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**BRIEF IN OPPOSITION TO APPLICATION  
FOR WRIT OF CERTIORARI**

---

HENRY P. MOLLOY,  
Attorney for Respondent,  
25 Broad Street,  
New York, N. Y.

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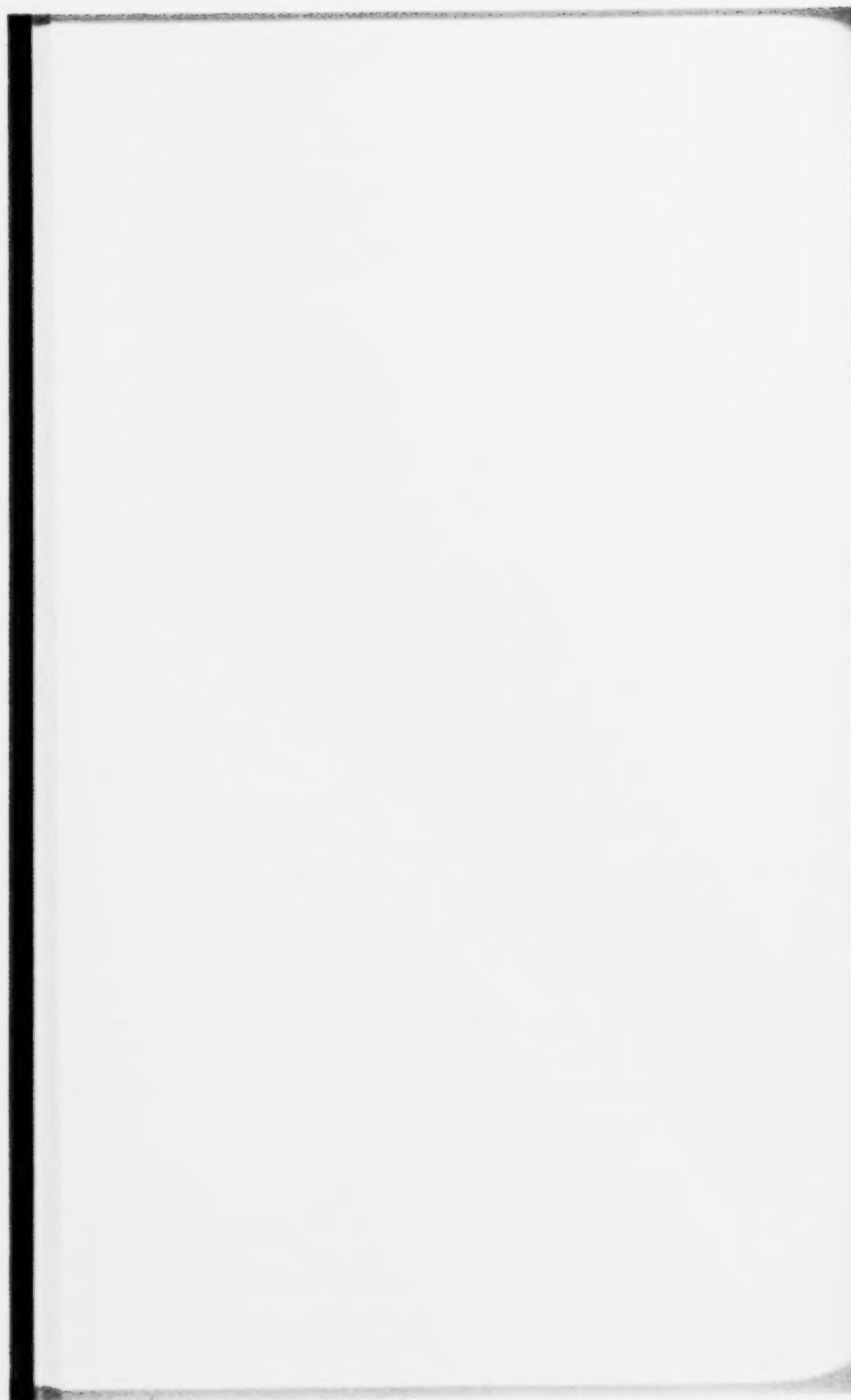


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# Supreme Court of the United States

OCTOBER TERM, 1920.

FEDERAL TRADE COMMISSION,  
Petitioner,

vs.

WINSTED HOSIERY COMPANY,  
Respondent.

## Statement

The order which was reversed by the Circuit Court of Appeals for the Second Circuit, whose action the petitioner seeks to have reviewed by the issuance of *awrit of certiorari* by this Court, was an order of the Federal Trade Commission dated January 29th, 1920, commanding the Winsted Hosiery Company to desist from using the labels "Merino," "Worsted" and "Wool" on underwear, socks or other knit goods composed partly of wool, except (1) when the knitted fabric is made entirely of wool yarns of a kind specified or (2) when the terms describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric.

The original order made by the commission was based upon a statement of agreed upon facts. When this proceeding came on to be heard before the Circuit Court of Appeals the commission applied for an order, which was granted, to take ad-

ditional evidence. At the conclusion of the taking of that evidence, new findings were made by the commission and it is the order entered thereon that was reversed by the lower court.

The Winsted Hosiery Company, for a great many years has been engaged in the manufacture of underwear which it sells to *retailers* (Paragraph Eight of Findings). Its standing is among the highest and best in that industry. In labeling and branding the boxes in which its goods were placed it has followed practices and customs which were general throughout the United States in the underwear trade (Paragraph Seven of Stipulated Facts).

It had labeled certain of its products as

"Men's Natural Merino"

"Men's Gray Wool Shirts"

"Men's Natural Wool Shirts"

"Men's Natural Worsted Shirts" and

"Australian Wool Shirts,"

following a universal custom in the industry, when in October, 1918, a complaint was lodged against it by the Trade Commission. Startled by this summary procedure, it answered, setting forth that it was following a general and universal custom and naming scores of manufacturers who were doing the same. This resulted in proceedings by the commission against these manufacturers. As a result the Association of Knit Goods Manufacturers of America, of which the respondent is a member, met in October, 1919, and adopted the following resolution:

"RESOLVED, that it is the sense of this conference that the general practice followed by each of the manufacturers in labeling and branding underwear manufac-

tured by them as Merino, Cashmere, Worsted and Wood Underwear, when in fact such underwear is not composed wholly of wool, but is composed in part of wool, varying in the percentage thereof to meet the varying demands of the trade solicited and served by them, is not done with the purpose, intent and effect of stifling and suppressing competition in the manufacture and sale of underwear, and that such brands and labels are not false and are not misleading and not calculated and not designed to, and do not, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool and which fact is universally known and understood by the manufacturers, jobbers, retailers and consumers of underwear throughout the United States and elsewhere; and

“FURTHER RESOLVED, That it is the sense of each and every manufacturer present at this conference that the welfare of the underwear industry makes it necessary and advisable to answer and defend the proceeding brought against them respectively by the Federal Trade Commission, to the end that the charge that they and each of them have been and are practicing any unfair methods of competition or deception to the public be effaced from the records.”

A committee was appointed at the same meeting, of which Mr. Lincoln Cromwell was chairman, to investigate the subject of labelling and to prepare a report for submission to the association. It did so and submitted the results of its labors to a general meeting of the association and its report was adopted (Exhibit #9). The report stated:

“We find that all of the descriptive terms complained of by the Federal Trade Commission have been used on the labels for the same underwear for a number of years,

in some cases for nearly half a century, and that these products are to-day among the most popular and respected in the country, showing beyond question that these manufacturers have kept their customers through the intrinsic value of their products which the consumer has worn, and not through wordings on labels of boxes usually left in the retail store.

“Neither the jobber nor the retailer buys his underwear under the influence of box labels. Samples are not shown in boxes. They carry only our price tickets. With the underwear manufacturer the label has been an after-thought, because it played no part in his selling. Your committee believes that the Federal Trade Commission exaggerated the influence which labeling on underwear boxes can have under the American system of retail selling where reputable stores practically warrant the value of all goods sold. We are, however, so jealous of the fair name of our industry, and of our individual reputations for fair dealing, that we have considered this complaint in the broadest way with the sole object of freeing the industry from any abuses which may have been made of our labels by dealers over whom we have no control, because of words used on the labels which meant one thing to the manufacturer and the dealer, but were capable of being misunderstood by the public.

“It is fair to suppose that the public will assume that any word on a label carries the meaning given in one of the standard dictionaries. We have taken the definitions in the Century, the Standard, the International and Worcester’s dictionaries of all the words complained of, including *wool*, *natural wool*, *woolen*, *merino*, *woolen merino*, *worsted*, *cashmere*, *camel hair*, and basing our suggestions on these dictionary meanings rather than upon any understanding of them by manufacturers and

dealers, we offer the following table of descriptive terms, setting opposite each class of underwear three lists of descriptive terms now used to describe it on box labels. In the first list are words which are not only beyond any chance of criticism, but are approved by the experience of many large distributors. They limit the label to its simplest terms, such as the mill name, the brand name, and the word undershirt, union suits, etc., with the color, size and quantity, and define the quality in exact terms, such as "Wool Underwear" or "Worsted Underwear," both meaning *all wool* knitted fabrics. In the second list is a set of words which are clearly permissive under the dictionary definitions, and while they are not so definite as the first list, we see no reason why mills using them should change their labels. The third list contains words which we believe are properly complained of because they could be used by an ignorant or dishonest clerk to deceive a customer as to the material content of the underwear."

Among the words which the committee held were clearly so permissive and for which it saw no reason why the mills using them should change their labels, were:

"Worsted Merino Shirts"

"Worsted Merino Suits"

"Woolen Underwear"

"Merino Underwear." (Exhibit # 9.)

This respondent, a signer and supporter of this report, accepted its recommendations and rulings. (Irrespective of the jurisdiction of the Commission it desired as an honest and upright manufacturer to deal with the subject fairly and justly.)

When, however, the Commission arbitrarily and in defiance of what it must have seen was the ac-



cepted fact, decided and ruled that the term "merino" should not be used in accordance with the definition of standard dictionaries and of trade and custom for fifty to seventy-five years, this respondent brought the matter for review to the Circuit Court of Appeals.

Apparently believing that the facts which it had stipulated were the facts and *which are the facts*, were insufficient to sustain its arbitrary ruling, the Commission attempted to vindicate its order with the testimony which was taken. It is believed that this testimony, so far as it is relevant, does not vary or alter the original stipulation.

At the outset of the taking of the evidence counsel for the petitioner offered "to accept the order of the Commission as made on the date of January 29, 1920, excepting in so far as the word 'Merino' is directed to be abandoned." This was done under the desire of the respondent to show as it had theretofore that it was in accord with the spirit which had actuated the manufacturers generally in meeting the complaints lodged against them in so far as there might be any reasonable basis for the same irrespective of any question of the power and jurisdiction of the Federal Trade Commission.

Notwithstanding this offer the counsel for the Commission insisted upon going over the whole subject and that is one reason this record has grown to its present size.

All the witnesses examined and the evidence produced was by the Federal Trade Commission; the respondent offered no testimony, being satisfied that the additional testimony but established the facts found in the original stipulation.

Out of 36 witnesses—retailers, jobbers and manufacturers—called by the Commission, 34 stated that “merino” for scores of years had been used to define a mixture of cotton and wool. These men were from New York, Massachusetts, Vermont, Connecticut, Pennsylvania and Washington, D. C., and represented in many cases the largest, most prominent and most respected manufacturers, jobbers and retailers in the East. Two found in Washington claimed ignorance of it, one of these being a relative of the employee of the Commission who was engaged in preparing the Commission’s case, the other a small haberdasher. Many of these witnesses also testified that from their knowledge the public understood “merino” as applied to underwear to mean cotton and wool.

During the course of the hearing the Commission sent out on two occasions a questionnaire to persons whose names were selected by the New York and Washington offices of the Commission. So far as the term “Merino” is concerned it would appear that about 40% in each case responded that “merino” meant cotton and wool mixed. *The counsel for the Commission on the hearings then produced those only who had responded that “merino” meant all wool.* This result at most is typical of the result when any body of people, students or the general public, is examined upon a list of terms, historical events, names, etc. The inaccuracy of answers cannot establish that recognized definitions, facts, etc., are untrue. Error cannot be predicated upon the ignorance of the answerer of the question.

During the progress of the hearings the counsel for the Commission sought to develop the fact that manufacturers had discontinued the use of the word “Merino” to mark a cotton and wool

garment. *In almost every instance it appeared that this was due to the ruling which had been made in this and similar cases and that the witness's concern had so acted lest it get into trouble with the Commission.* Not content with this testimony the Commission sought to improve its case by having associations take action *and then offered such resolutions as proof.* Under the urging and solicitation of the counsel who tried this case for the Commission, the National Association of Retail Clothiers acted by its directorate. The following letter was then submitted in proof:

Chicago, Ill.  
November 18th, 1920.

Federal Trade Commission,  
1100 Browning Building,  
14 West Washington Street,  
Chicago, Illinois.

Gentlemen:

*At the suggestion of a representative of your office, we yesterday brought to the attention of the Board of Directors of our Association, who were in session here, the investigation which is being conducted by the Federal Trade Commission regarding the use of certain brands on knitted underwear which was not of pure wool, and which terms might be construed as misleading. The definite terms specified, we understand, were the following: (1) "Natural Merino" (2) "Gray Wool" (3) "Natural Wool" (4) "Natural Worsted" (5) "Australian Wool."*

The following is quoted from the minutes of that meeting, approved by the Board of Directors:

*'It is the sense of the Board of Directors of the National Association of Retail Clothiers that the terms (1) "Natural Merino" (2) "Gray Wool" (3) "Natur-*

al Wool" (4) "Natural Worsted" (5) "Australian Wool" used as a brand or name on underwear that contained cotton or other adulterant than wool or on the box containing such underwear might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated and that such misleading terms should not be used.'

*It is at the suggestion of this same representative of your body that we are forwarding the above information to you.*

Very truly yours,

NATIONAL ASSOCIATION OF  
RETAIL CLOTHIERS,

(sgd) CHAS. E. WRY,  
Secretary.

Meantime the Commission had brought the pressure of its strong arm to bear upon the Knit Goods Manufacturers of America and on November 18th, 1920, had secured the passage of the following resolution, which was offered in support of the Commission's case:

"Use of words Woolen and Merino Resolutions adopted by the Knit Goods Manufacturers of America November 18, 1920.

"WHEREAS, the label report adopted by this Association in November, 1919, permitted the words 'woolen' and 'Merino' to be used on labels covering knit goods made partly of wool and partly of cotton, and

"WHEREAS, such use of these words has been criticized before the Federal Trade Commission as tending to deceive retail salesmen or consumers into thinking the fabric all wool when in fact it may be chiefly cotton, and therefore be it

"RESOLVED, that this Association request all its members to discontinue the words

'Woolen' and 'Merino' on their labels and stamps, unless followed by the words 'wool and cotton,' and

"RESOLVED, that a copy of this resolution be filed with the Federal Trade Commission with a statement that the words 'woolen' and 'Merino' have never to our knowledge been used in unfair competition, and that this action is taken only because we are informed that in parts of the United States remote from the manufacturing districts these words mean all wool or merino quality of wool, and because this Association is anxious to avoid all chance of deception in the sale of its products to the consumer."

Proof was offered to show that the term "merino" in the *wool market and commercially* is used to designate a fine grade of wool and that there are a considerable number of sheep in the United States of the breed of "merinos," a stock which originally came from Spain. The definitions found in standard and trade dictionaries were introduced, many of which contained the definition of "merino" as employed by this petitioner and the industry generally.

*There is not a syllable of testimony in the case to show that the term "merino" has ever been used by manufacturers, jobbers or retailers to brand or mark an underwear garment which was all wool. There never has been such a thing as a "merino" all wool garment. On the contrary the testimony shows that practically universally all wool garments have been specifically marked "all wool" or "guaranteed" or "warranted all wool."*

## Argument

The petitioner, Federal Trade Commission, sets forth six reasons why its petition should be granted. We shall discuss and answer them *seriatim*.

### (1)

That the decision of the Circuit Court of Appeals for the Second Circuit is not in accord with the decision in *Federal Trade Commission vs. Gratz*, 253 U. S. 421.

In the case of *Federal Trade Commission vs. Anderson Gratz, et al.* (253 U. S. 421), Mr. Justice MacReynolds, delivering the opinion of the Supreme Court, said:

“The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.”

In the dissenting opinion in the Gratz case Mr. Justice Brandeis said:

“The task of the Commission was to protect competitive business from further inroads by monopoly. It was to be vigilant. If it discovered that any business concern had used any practice which would be like-

ly to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene.”

In the case at bar there is no competition in use of the word “merino.” It has been used in the knitgoods industry for more than half a century to define a fabric made of cotton and wool. It never has been used to define an all wool garment.

The manufacturers with whom this respondent competes, the retailers, except a few “ignorant or unscrupulous” (such is the finding of the Commission), to whom this respondent and its competitors sell—all use the term “merino” to define a mixture of cotton and wool. How, therefore, can any question of competition arise in the use of this term? No manufacturer, no jobber, practically no retailer (except the “ignorant and unscrupulous”) ever meant anything else in using the term “merino” except a garment of cotton and wool.

Certainly a practice in the use of the term “Merino” universally followed for more than 50 years, recognized by the trade, by government departments and by the courts, cannot be stamped as an unfair method of competition. It cannot be stigmatized as opposed to good morals, because characterized by deception, bad faith, fraud or oppression, or as against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. There has been and is no deception, no bad faith, no fraud, no oppression, no tendency to hinder competition nor create monopoly.

As the Court below said in its opinion:

“In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly. Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition or for an injunction or damages under the Anti-Trust Acts. Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning the result is in no way connected with unfair competition but is like any other misdescription or misbranding of products.”

(2)

That there is a conflict of decision respecting the jurisdiction of the Federal Trade Commission between the court below and other circuits.

As indicated above the decision herein by the lower court is in complete accord with this court. The alleged conflict between the Second Circuit and the Seventh Circuit in the case of *Sears, Roebuck & Company vs. Federal Trade Commission* (258 Fed. Rep. 307) does not exist. A most casual examination discloses that.

(3)

That the Court erred in holding that the Federal Trade Commission is without jurisdiction to prevent the use of labels upon commodities trans-



ported in interstate commerce that injure competing manufacturers by misleading the consumer although such labels are understood by the trade.

Of course there is no proof in this case that any competitor of the respondent is injured and therefore to that extent the statement of reason is erroneous.

The testimony of the witnesses, produced by the Federal Trade Commission, was that there was *no* "unfair competition." The record will be searched in vain to find the testimony of any competitor—and many of them were examined—asserting that there was any unfair competition.

The very findings of the Commission show that there was no error in the decision of the Court below.

The respondent is a knit underwear manufacturer, with its principal factory and branches in Connecticut. (Findings of Fact, paragraph one.) *It sells and ships its product to retailers throughout the United States.* (Findings of Fact, paragraphs Two and Eight.) It uses labels containing the word "merino" on its boxes but not on its garments, where the garment so sold is not composed wholly of wool but is part wool and part cotton. (Findings of Fact, paragraphs Four, Five and Six.) *"The word 'merino' is used by manufacturers of yarn and knit underwear and generally by jobbers and retailers as a trade term meaning a combination of cotton and wool."* (Findings of Fact, paragraph Nineteen.)

The Commission has therefore found as a fact that in the industry in which the respondent must find its competitors and among those to whom it sells its product, "merino" means and is used to define a garment made of cotton and wool. In

so labeling its product, there is no fraud, no deception and absolutely nothing unfair. When a term is used, which is general in its use, which is generally used by manufacturers, jobbers and retailers in the knitwear industry, to describe exactly the kind of garment which the respondent makes, wherein lies the unfair method of competition?

What the Federal Trade Commission has endeavored to do herein is to assume that the declared unlawful acts and prohibition set forth in the Act creating the Commission are the same as if the statute read "The introduction into interstate or foreign commerce of any article, either manufactured or raw product, which is adulterated or *misbranded*, is unlawful." As the Court will see at a glance the Commission by its order herein has assumed to declare that the unlawful act defined in the Federal Trade Commission Act, is the same as the unlawful act defined in the Pure Food and Drug Law, extended to any product. (June 30, 1906, c. 3915, sec. 2.)

(4)

That the Court ignored findings showing extensive competition between garments and those of its competitors.

The Court below said: "In this case there was obviously no unfair method of competition as against other manufacturers of underwear (respondent's competitors)."

The significant fact which will not and cannot be crowded out is that there is not in the entire record a syllable of proof that *any* "all wool" underwear garment has ever been marked "*merino*." No one in the industry ever heard of an

all wool garment being labeled "merino." "Merino" has always been used in knit goods wear to define a mixture of cotton and wool. It is quite clear that the charge that the Court below ignored findings supported by evidence is ungrounded.

(5)

That the Court below rests its decision on an agreed statement of facts which is contradicted and superseded by new findings made by the Commission, etc.

How such an assertion can be made is somewhat startling. A reading of the opinion will dispose of this unwarranted and untrue statement.

(6)

That the Court below erred in holding that the testimony "fully established that the trade was not misled in any respect," notwithstanding findings Numbers Thirteen and Fourteen.

An examination of the record supports the opinion of the Court below in every way. The "Nineteenth" finding in itself is a statement to the same effect.

The question which this petitioner seeks to have reviewed is, we believe stated, under the facts of this case, as follows:

A portion of the public, the ultimate consumer, ignorantly or otherwise, thinks "merino" upon boxes of underwear means that the garments are all wool. It matters not that those to whom the respondent sells, the retailers, know that "merino" means a mixture of cotton and wool, and that the respondent's competitors, the manufacturers, for 50 and more years have followed a general

practice of so branding their goods. The respondent nevertheless should be found guilty of *unfair* competition, because a portion of the public, with whom the respondent has no dealings whatsoever, is *self-deceived*.

As the Court below said:

"In this case there was obviously no unfair method of competition as against other manufacturers of underwear (respondent's competitors)."

The Federal Trade Act is not a "Pure Products" act.

*Federal Trade Commission vs. Gratz*,  
253 U. S. 421.

*New Jersey Asbestos Co. vs. Federal Trade Commission*, 264 Fed. Rep. 509.

*Sears, Roebuck & Co. vs. Federal Trade Commission*, 258 Fed. Rep. 307.

### **Conclusion**

It is respectfully submitted that no question is submitted for review which has not already been decided by this Court, that upon the facts and upon the law, as announced by this Court, the Court below correctly decided this case, and that the petition for a *writ of certiorari* to review the decision of the Circuit Court of Appeals for the Second Circuit should be denied.

HENRY P. MOLLOY,  
Attorney for the Winsted Hosiery  
Company, respondent.

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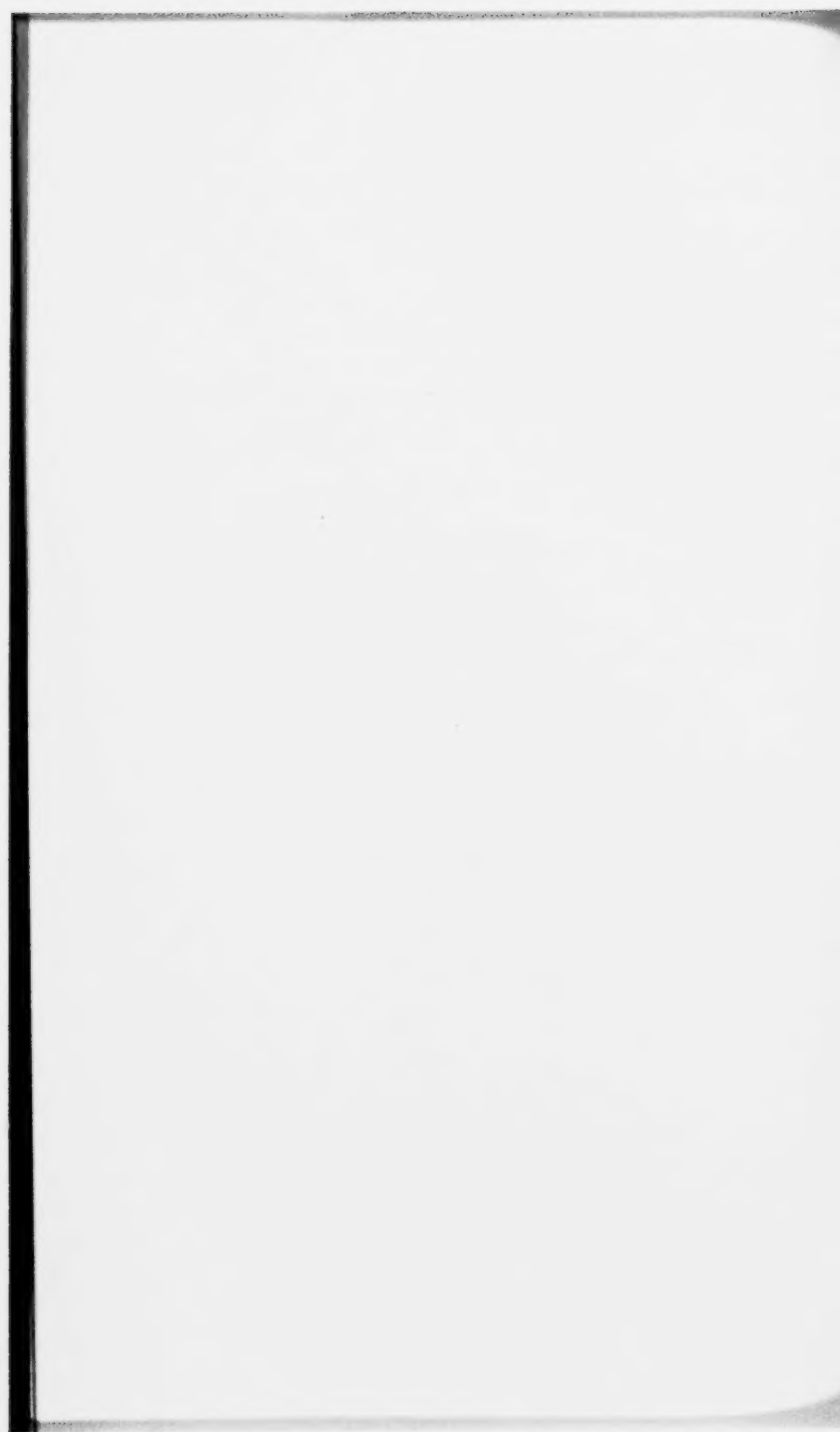
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# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

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FEDERAL TRADE COMMISSION,  
petitioner,  
v.  
WINSTED HOSIERY COMPANY,  
respondent.

} No. 333.

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*ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF FOR THE PETITIONER.

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### STATEMENT OF THE CASE.

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, for review of the order of that court reversing an order of the Federal Trade Commission requiring the respondent to cease and desist from using the labels, "Merino," "Wool," or "Worsted" on underwear made partly of cotton, unless the presence of the latter is also indicated, as constituting an unfair method of competition.

The Commission's order was the result of a proceeding taken under the provisions of the act creating the Federal Trade Commission.

The Commission issued its complaint October 30, 1918 (p. 19), which, after setting forth the jurisdictional facts as to interstate commerce, embodied the charge against the respondent in paragraph 3, as follows:

Paragraph 3. That for more than one year last past the respondent, Winsted Hosiery Co., with the purpose, intent, and effect of stifling and suppressing competition in the manufacture and sale of underwear in interstate commerce, has, in the conduct of its business, manufactured and sold in commerce aforesaid, and labeled, advertised, and branded, certain lines of underwear composed of but a small amount of wool:

"Men's natural merino shirts."

"Men's gray wool shirts."

"Men's natural wool shirts."

"Men's Australian worsted shirts."

"Australian wool shirts."

That such advertisements, brands, and labels are false and misleading and calculated and designed to, and do, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool.

The respondent filed an answer (p. 22), in which it admitted the jurisdictional facts as to interstate commerce. It denied paragraph 3 of the complaint, except that it admitted it had labeled, advertised, and branded certain lines of underwear as alleged in paragraph 3, and that such underwear was not composed wholly of wool. For a separate defense

the answer alleged (paragraph three) that for 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear as "natural merino," "wool," "natural wool," "natural worsted," and "Australian wool" when such underwear so described is not composed wholly of wool, and that said general custom and practice has been and now is well known to and recognized by the distributors of underwear throughout the United States; also (paragraph four) that the same practice prevails in importations of underwear; and,

Paragraph five. That respondent did not create or originate the aforesaid custom or practice, but has been following the same in competition with and in like manner as followed by other underwear manufacturers throughout the United States as well as the underwear imported from foreign countries; that the following are the names of some of the said manufacturers of underwear in the United States, namely: (Here follow the names of 32 manufacturers.)

Thereafter, an agreed statement of facts (p. 24), stipulated by the Commission and the respondent, was adopted in lieu of testimony. This stipulation included the fact of interstate commerce; that the word "merino," as known in the underwear trade, signifies a fabric composed of a mixture of wool and cotton; that the word "worsted," as known in the underwear trade, signifies a fabric which is not wholly composed of wool; that the respondent had

labeled, advertised, and branded certain lines of underwear and shirts as alleged in the complaint; and,

Paragraph 6. That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent; that the aforesaid brands and label do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of wearing apparel; therefore such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool, when, in fact, they contain part cotton (p. 25).

Paragraph 7 of the agreed statement of facts is substantially a repetition of paragraphs 3 and 4 of the answer, to the effect that domestic and imported underwear composed of cotton and wool has been generally labeled, advertised, and branded in the same manner as by the respondent, and recites that—

This custom and practice is general and universal in the underwear trade throughout the United States, and is followed by manufacturers engaged therein.

On this stipulation of facts in lieu of evidence, the Commission made its findings and conclusion and issued an order that the respondent cease and desist from using such labels unless it be also indicated that

the goods so labeled contain cotton as well as wool (pp. 15-17).

Like proceedings were brought against a score or more of manufacturers of knit underwear named in this respondent's answer, and like orders were issued in other cases. The respondents generally were members of the Association of Knit Goods Manufacturers of America, and the question of reform of the misbranding complained of had been taken up with that body by the Commission, and its orders, in this and the other cases, identical in principle, had been drawn in the form suggested by the chairman of the committee of the association, whose report on the reform of the prevailing labeling of underwear had been unanimously adopted by the association. The chairman referred to reported to the Commission that to the best of his information all of the manufacturers of wool and cotton mixed underwear who had used the word "merino" had, with a single exception, abandoned the use of the word (p. 51).

This respondent filed a petition in the Circuit Court of Appeals, Second Circuit, for a review of the order originally entered by the Commission as stated, on the grounds that the agreed statement of facts did not support the findings to the effect that the respondent's labels were misleading to the public, and that the conclusion of law—that the use of the labels constituted an unfair method of competition in violation of section 5 of the Federal Trade Commission act—was not warranted and in

conflict with the findings of fact; and that "the Commission has substituted its own individual conception of the meaning of the words 'unfair methods of competition' for the legal signification of the same words as employed in the said Federal Trade Commission act and has exceeded the powers granted to it by Congress" (pp. 1, 6).

The validity of the order, which had, as stated, been framed in consultation with representatives of the industry and generally accepted, being thus challenged, the Commission deemed it important to have the complete evidence in the matter taken, so that the question could be tested by the court on all the facts instead of the stipulated agreement, which was without any basis of formal or sworn evidence, and adopted largely in reliance on the attitude of the industry noted above.

The Commission, therefore, availed itself of the provision of section 5 of its act for application to the court by either party for leave to adduce additional evidence, and filed a petition with the Circuit Court of Appeals for an order authorizing the taking of additional evidence. This was granted and the new evidence was filed with the court within the time prescribed in its order. With it were filed new findings of fact based on the evidence, and a modified order (pp. 44-52) in accordance with that portion of section 5 which provides that, after the taking of new evidence under the provisions resorted to—

The Commission may modify its findings as to facts or make new findings, by reason of the

additional evidence taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence.

At the opening of the hearing to take new evidence the respondent offered to accept the Commission's order as to the labels "wool" or "worsted" in accordance with the unqualified condemnation of the Knit Goods Association's report; but the Commission deemed it best to rest the whole case on the actual evidence (fol. 53). The court below, it will be noted, reverses the Commission's order as to all these labels, "merino," "wool," and "worsted," without distinction.

The record, as certified by the Circuit Court of Appeals, therefore, contains both the original record on which the appeal was filed, namely, the findings and order based on the stipulated facts in lieu of evidence, and the testimony thereafter taken and the findings and order based thereon. It is the latter, it is submitted, which are to be reviewed here.

As appears from the record, the petition of the respondent here to the Circuit Court of Appeals to review the original findings is based on the agreed statement of facts and does not cover the new evidence and findings based thereon, which are part of the proceedings taken subsequent to the filing of the petition.

The new evidence and findings present a distinctly different state of facts from the stipulation relating to the extent among respondent's competitors of the use of the labels as charged in the complaint. It is the respondent's main contention, that such use is universal, and therefore an unfair method of competition does not exist. Its theory is based on the proposition that labeling which misleads the purchasing public, if generally practiced, does not constitute an unfair method of competition within the statutory jurisdiction of the Commission. This proposition ignores the fact, recognized in the stipulation of facts, that there were manufacturers of all-wool underwear who properly labeled their garments (p. 26). It is obvious that any false and misleading representations by manufacturers of underwear made partly of cotton that they were all-wool would be an unfair method of competition as to the manufacturers of all-wool. In addition, the evidence taken showed, contrary to the stipulation, that the use of misleading labels similar to respondent's was far from universal among manufacturers of cotton-and-wool underwear as well as extensive manufacture of all-wool underwear.

The distinction between the original findings, based on the stipulation of facts, and the findings based on the evidence, which the law says the Commission shall make, and which, "if supported by evidence, shall be conclusive," is obviously very important, especially in relation on the question of competition raised by the respondent. It is of supreme impor-



tance in view of the judgment of the court below, because that court seems, apparently by inadvertence, to have based its decision on the original stipulation of facts in this respect. In its opinion it overlooks or ignores the new findings based on the evidence taken, and recited the stipulation as to the universal use of respondent's labels. If prior to the taking of evidence and making of new findings there was ground for the conclusion that the practice complained of did not constitute a competitive method because all competitors were doing the same thing, any support for such a conclusion has been swept away by the new findings based on full and positive evidence to the effect that there are numerous manufacturers of cotton-wool goods who never misbrand their products and yet are compelled to sell them in competition with those of the respondent, and also that there are numerous manufacturers of all-wool underwear who are deprived of their exclusive right to the terms "merino," "worsted," and "wool" to describe their goods.

#### **ERRORS RELIED ON.**

It is respectfully urged that this judgment of the circuit court of appeals should be reversed for the following reasons:

1. The court erred in holding that the Federal Trade Commission is without jurisdiction to prevent as an unfair method of competition the use of labels by manufacturers on goods sold in interstate commerce which purport to indicate the composition of

the goods and which by misrepresentation, tend to the deception of the purchasing public.

2. The court erred in adopting part of the agreed statement of facts (par. 7, p. 14), to the effect that the use of the labels which are the basis of the charges against the respondent was universal among the manufacturers of knit underwear and the trade, and in overlooking the evidence superseding the stipulation and the findings based thereon, Nos. 21 to 24, inclusive, which contradict the former findings.

3. If the court considered the new evidence and findings referred to in the preceding paragraph, it erred in holding that the Federal Trade Commission was without jurisdiction in the premises and that the evidence did not establish an unfair method of competition.

4. The court erred in holding that the test of the deceptive character of the labelling was the effect upon the skilled buyers in the jobbing, wholesale, and retail trade, whereas the true test is the effect produced or reasonably likely to be produced upon the unskilled purchasing public.

5. The decision is not in accord with the decision of this court in *Federal Trade Commission v. Gratz*, 253 U. S. 421.

#### THE FACTS.

The essential facts may be thus briefly stated:

The respondent is engaged in the manufacture of knit underwear, shirts and drawers, and hosiery, its sales for the three years prior to October 31, 1918, amounting to \$2,500,000 (p. 73). For a number of

years prior to 1918 it manufactured and sold to retail dealers such garments, composed in part of wool and in part of cotton, the percentage of wool varying from 25 to 80 per cent. The percentage of wool has run, however, as low as 10 per cent (pp. 68, 72-73, 381). These garments are packed in boxes, to which are pasted or attached labels bearing the legends "Men's natural merino shirts," "Men's gray wool shirts," "Men's natural worsted shirts," "Australian wool shirts," and "Men's natural wool shirts" (pp. 59, 73). As a rule, for the underwear containing 50 per cent or less of wool respondent has used labels containing the word "merino," and on those containing more than 50 per cent of wool, labels containing the word "wool" (pp. 69, 77). Respondent has not manufactured or sold all-wool underwear for many years (p. 70). The boxes containing respondent's underwear, so labeled by it, are customarily placed by retailers on their shelves, exposing the labels to the view of customers—ultimate consumers—and the retailers and their salesmen have sold the contents to the public from the boxes so labeled (pp. 78, 137, 192, 218, 222-223, 225, 228, 241, 250, 269, 271).

A substantial part of the consuming public understands the words "merino," "natural merino," "natural wool," "gray wool," "natural worsted," "Australian wool," and "gray merino," as applied to underwear, to mean all-wool underwear (pp. 256-266, 283-309, Ex. 25 and 26, pp. 421-423, 355). Also, some retailers and buyers and salesmen for

retail establishments so understand these terms (pp. 123, 157-159, 161-162, 166, 178-179, 183, 212, 217, 222-224, 271, 340). Furthermore, some retail dealers and their employees rely on the labels on the boxes, including those of the respondent, in which they sell underwear to the public, in representing the materials of which the underwear is composed, and at times represent the underwear in boxes labeled as above described as all wool (pp. 225, 234, 251, 351). Misrepresentations to the effect that garments of the character involved here, composed of varying proportions of wool and cotton, are composed wholly of wool is encouraged and aided by the labels so attached (pp. 89, 168, 177, 182, 220, 229, 234, 250), and such labels, coming to the view of the ultimate buyer, are calculated to, and do, mislead a substantial part of the purchasing public into the belief that the garments sold under these labels are all wool (pp. 125, 223, 225, 234, 236, 267-268, 351, 380-382). Similarly, the words "merino," "wool," and "worsted" severally tend to mislead, and do mislead, a substantial part of the consuming public into the belief that the garments are all wool.

While a number of the manufacturers of underwear have, for some years, labeled their product composed partly of wool and partly of cotton in the same manner as respondent, many others have sold such underwear without any such labels, or have sold it under labels correctly indicating its composition (pp. 90-91, 96, 97, 100, 118, 133, 134-135, 139, 142, 145-146, 171, 173-174, 176-177, 181, 202, 302, 366-367).

All-wool underwear is manufactured extensively in the United States, and, as sold in competition with goods of the respondent's manufacture, is labeled, variously, "all wool," "wool," "natural wool," "random wool," and "pure wool"; all-wool underwear is also imported into the United States and sold in competition with goods of the respondent, which is labeled, variously, as "all wool," "wool," "natural wool," "pure wool," and "lamb's wool" (pp. 90-91, 109-110, 128, 139, 140-141, 152, 165, 338-339, pp. 357-359, Ex. 28, and pp. 361-362).

To the above statement it may be well to add the fact that the American Knit Goods Manufacturers' Association, an organization representing 75 per cent of the manufacturers in this country of the class of knit underwear manufactured by respondent, has passed resolutions declaring that it is the sense of the association that it is improper to apply the terms "wool underwear," "worsted underwear," "natural wool underwear," "Australian wool underwear," and "natural merino" to underwear composed partly of wool and partly of cotton, and the use of the words "wool and cotton" on such garments has been recommended by the association (Ex. 9, p. 407). Certain large retail dealers have, prior to the commencement of this proceeding, stopped using "merino" as a label or word of description in the sale of underwear, because of the public's misunderstanding of its trade use (pp. 96, 133, 181, 184, 301, 314, 364-365).

**THE QUESTIONS PRESENTED.**

The question here, therefore, is whether the elements in the case submitted constitute "an unfair method of competition" under the act.

The two fundamental elements of the unfair method of competition alleged in the complaint are (1) the misleading of the public by the misrepresentation as to the composition of the respondent's product conveyed by its labels, and (2) the unfair competition through such deception, with manufacturers, (a) of all-wool garments and (b) of underwear composed like that of respondent of cotton and wool, who make no representation as to the composition or label their goods specifically in that respect.

The grounds on which the Commission rests its conclusion that such unfair method of competition exists are:

1. That the words "merino," "wool," and "worsted" properly signify wool to a large part of the purchasing public, and to some of the trade who are not instructed in the technical and corrupt use of those words by the trade.

2. That the respondent by the use of the words "merino," "wool," and "worsted" in labeling its product of knit underwear composed partly of wool and partly of cotton is responsible for the misleading of the purchasing public into believing that the goods so labeled and advertised are made wholly of wool.

3. That it is non-essential whether or not the trade, that is the jobbers or retailers, through whom the respondent and competing manufacturers sell directly,

are misled and deceived as above set forth, because the true test is the effect, or tendency to effect, upon the unskilled purchasing public.

4. That in competition with the respondent in the manufacture and sale of knit underwear are—

(a) Manufacturers of underwear composed wholly of wool, which is so labeled, and

(b) Manufacturers of knit underwear composed partly of cotton and partly of wool, which is put on the market and labeled in various ways other than as alleged in the complaint on the part of this respondent; that these methods of labeling include trade-marks or trade names without any description of composition whatever, labels consisting of coined or fanciful names without description of composition, and labels indicating the presence of cotton as well as wool.

5. That by the use of its labels, as alleged, respondent practices an unfair method of competition as to the manufacturers who label their goods as described in paragraph 4 above, because it represents and leads the purchasing public to believe that its product, made partly of cotton, is made wholly of wool, and thereby tends to displace sales—

(a) By manufacturers of all-wool underwear, and

(b) Of underwear made partly of cotton and partly of wool, not represented to be made wholly of wool.

The evidence on which the petitioner relies to support its contentions as to the facts, as stated above, is summarized in the following findings:

Paragraph 1. Findings 4, 5, 9, 10, 11, 12, 13, 16, 17, and 19.

Paragraph 4. Findings 20, 21, 22, 23, and 24 (pp. 46-50).

The legal propositions set out in paragraphs 2 and 3 above are discussed below. Paragraph 5, so far as it includes a finding of fact, is based on the whole evidence.

#### ARGUMENT.

The respondent in its brief in the court below and in this court in opposition to the issuance of the writ of certiorari attacked the accuracy of the Commission's findings respecting the understanding of the consuming public and in the trade of the term "merino," and the effectiveness of the method employed to carry to the trade and to the public the representation that the garments are all wool. (Pars. 4 and 10 of the Commission's findings.) This contention of respondent as well as the unavoidable inference that the court below failed to consider the evidence taken under order of that court, on which the Commission's finding of the existence of competition between the respondent's goods and goods of other manufacturers composed entirely of wool, appears to make it necessary to review somewhat fully here the evidence supporting these findings of the Commission.<sup>1</sup>

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<sup>1</sup> "The statute further provides that the finding of facts by the Commission shall be conclusive if supported by any



### I. Deception of the Public.

While the court below does not specifically affirm or disturb the findings as they appear in the record, it may be inferred from its opinion that the findings to the effect that the public is misled by the respondent's practice in labeling are accepted as supported by the evidence.

If the court considered on this point, as in the matter of the evidence of unfair competition toward other manufacturers, only the stipulation of facts entered into before the evidence was taken, this conclusion as to the court's recognition that respondent's use of labels mislead some of the public would be justified. Part of the stipulation entered into was as follows:

Paragraph 6. That the aforesaid articles of wearing apparel are not composed wholly of wool, part of the material in the said articles being wool and part being cotton, the percentage of wool in the said articles varying from 20 to 80 per cent. That the aforesaid brands and labels do not show or indicate the true composition and constituent parts of the materials used in the manufacture of the said articles of

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evidence. It follows that there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject." (*National Harness Manufacturers' Association v. Federal Trade Commission*, 261 Fed. 170.)

wearing apparel; therefore, such brands and labels may tend to mislead the purchasing public into the belief that the articles so branded and labeled are composed wholly of wool when, in fact, they contain part cotton.

The court says:

Assuming that some consumers are misled because they do not understand the trade significance of the labels or because some retailer deliberately deceives them as to the meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of products. Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is, in our opinion, not within the province of the Federal Trade Commission to do so (p. 397).

(a) Popular understanding of the terms "merino," "wool," and "worsted."

The primary question in this case is the popular understanding of the terms "merino," "wool," and "worsted" as applied to underwear. On it depends the question of an unfair competitive method. The answer admits so labeling its product composed of cotton and wool and selling it so labeled; if the terms signify something else than the substances to which they are applied, the inference that they tend to mislead is unavoidable. The popular meaning of the word "natural," which appears in combination in the labels with the three terms named, can hardly be

disputed. It is hardly capable of definition except in its own terms. The best synonym for it in this application is probably "real," which changes in no way the original meaning of the term to which it is applied, except as an intensive; it only emphasizes whatever the term "merino," "wool," or "worsted" means alone. The words "gray" and "Australian" still less call for definition.

The word "merino" is the one whose popular meaning is chiefly controverted. The respondent offered to eliminate from the case the terms "wool" and "worsted." This offer was not accepted, the Commission deeming it proper to base any order affecting any of the terms complained of on proofs.

**(b) Direct testimony of consumers.**

The direct evidence as to the public's understanding consists of the results of questionnaires sent to individuals in seven cities—New York, Washington, Philadelphia, Boston, Chicago, Detroit, and Buffalo—asking the persons addressed to indicate as to each of the respondent's labels his or her understanding, when purchasing underwear, whether all wool or wool and cotton, and the testimony of some 20 of the approximately 180 persons who answered the questionnaires, who were put on the stand and submitted to cross-examination. The questionnaires and the answers given were received in evidence without objection, and by stipulation this evidence appears in the record as Commission's Exhibits 25 and 26 (pp. 355, 421-423). The witnesses, residents

of New York City and Washington, with hardly an exception, confirmed by their testimony their answers to the questionnaires, namely, that "merino," as well as "wool" and "worsted," as applied to underwear signified to them all wool. The names of the persons to whom the questionnaires were addressed were taken haphazard from the telephone directories in the Commission's office in Washington, except that in New York City about 25 per cent of the addresses there were supplied by the New York office of the Commission, as appears from the affidavit of the Commission's agent in charge of the questionnaires. One questionnaire covered the three terms "merino," "wool," and "worsted," and one the term "merino" alone. The returns to the former, as tabulated, show that out of 158 responses as to the label "natural merino" 109 indicated their understanding to be all wool. The responses as to the other labels were as follows:

"Gray wool"—137 all wool, 32 mixed.

"Natural wool"—154 all wool, 16 mixed.

"Natural worsted"—97 all wool, 65 mixed.

"Australian wool"—146 all wool, 15 mixed.

In response to the second questionnaire relating to "merino," in two slightly differing forms, 19 indicated, in one case, that they understood by that term all wool and 10 cotton and wool, and in the other 20 all wool and 11 cotton and wool.

It appears, therefore, that of 180 to 190 responses, two to one indicated all wool to be their understanding of the term "merino" as used on knit underwear.

The witnesses called gave definite grounds for their responses as generally based on the meaning of "merino" as a fine wool (pp. 256-266, 283-309). The older witnesses supplied evidence of the universal identification of "merino" with fine wool in the past, and the deep foundation for that understanding to-day is shown by the testimony of younger witnesses.

(c) **Dictionary and trade definitions.**

The case as to the public's understanding of the labels might perhaps have been rested on the popular meaning, of which the court will take judicial notice, supported by the dictionary definitions. "Wool" and "worsted" certainly mean but one thing, and primarily "merino" means only merino wool or the sheep itself. But it is contended by the respondent that the secondary meaning in the trade, namely, cotton and wool, has become popular. The petitioner's evidence is addressed largely to refuting this.

The respondent relies on the definitions of trade dictionaries. The difference between the trade and popular meanings is made clear by comparison of the definitions of the standard dictionaries of the English language (fol. pp. 200-201, 255-256, 353).

The amount of it is that the American popular dictionaries indicate that the use of the term as applied to fabrics as meaning wool garments is wide. As intimated above, the case might be rested on that showing, because the inference is indisputable that at least a substantial part of the public understand the term to mean wool, and it is sufficient to justify the

order of the Commission if a part of the public would naturally be misled.

The order proposes nothing but to add to the terms "merino," "wool," and "worsted," when applied to goods made partly of cotton, words indicating that fact. If some of the public, through special contact with the trade, so understood it already, no harm would be done so far as they are concerned; while as to the public who does not so understand it, a mistake, which exposes them to imposition, would be corrected.

(d) *Merino a synonym of fine wool.*

In connection with the testimony of individuals, showing their association of the word "merino" as applied to underwear with the sheep and wool of that name, the facts as to the basis for that association are presented fully by the evidence (pp. 157-158, 176-177, 255).

Confirmation of the practical importance of merino wool in the woolen industries of the country is furnished by the testimony of manufacturers of yarn as to its position in the market for wools prepared for manufacture into yarns for knit goods (pp. 325-327). Mr. Brooks, president of the National Association of the Worsted and Woolen Spinners, testified:

The term "merino," properly speaking, is used to apply to the full-blooded merino sheep, which grows the finest wool grown in the world.

Trade custom here designates a fine wool as fine, a half-blood wool as half-blood, a three-eighths blood as three-eighths, a quarter-

blood as quarter-blood, \* \* \* and [these terms] refer to the merino blood in the sheep (pp. 323-324).

The association of the word and its connotation in the public mind with "wool" and nothing else, are seen to have a historical and practical present basis. It is virtually synonymous with fine wool.

(e) Original meaning of "merino" persists in the trade.

It may be noted, in connection with the assertion in the opinion of the court below, that "the labels were thoroughly established and understood in the trade," that the evidence shows that at least some dealers and salesmen have not acquired the respondent's use of the terms "wool," etc., by which a counterfeit, partly cotton, is offered to the public (pp. 101, 123, 157-159, 160-162, 166, 178-179, 183, 212, 217, 222-224, 234, 240, 245, 271).

This evidence to the persistence even in the trade of the original meaning of "merino" is most significant of the popular understanding and, in connection with the dual understanding of the trade, shows that the process of transforming the language in this conspicuous example of historical and familiar usage by the debasement of the trade is far from complete. Merino is synonymous with wool, as often a conspicuous, particular term, representative of the best or foremost of a class, comes to stand for a generic term; moreover, it is a household word for one of the most important of all men's natural materials, and to transfer it in the popular acceptance to the

vegetable substitute of cotton is, the evidence shows, impracticable. This applies equally to "worsted." As Mr. Turnbull, president of Roger Peet & Co., New York City, testified, "merino can not be anything else but wool—it can not be chewing gum."

(f) Confusion due to trade usage of "merino."

The evidence consisting of the testimony of members of the trade, jobbers, retailers, buyers, and salesmen, giving the results of their observation and experience in dealing with the public as to the purchasers' understanding, has the peculiar disadvantage that many of these witnesses were asked to testify as to whether labels under which they sold their goods deceived purchasers. It is obvious that an affirmative answer involved an unwilling admission. As a fact, nevertheless, much of this evidence goes to corroborate the direct evidence that the labels in question as used by the respondent tend to mislead the purchasing public.

The position of the respondent is that the trade usage should govern, whereas the Commission contends that the trade use is an artificial and conventional corruption adopted by the trade for the meretricious purpose of enhancing the value of their goods, and that the public is not bound by it in purchasing underwear, and, as a fact, has not learned it. In other words, as in many industries, the trade and the public to some extent speak different languages. It is submitted that the public should not



be exposed to swindling because of its failure to understand the trade's terminology, making fraud possible.

But a number of witnesses drawn from the retail shops testified to the public's understanding of the labels "merino" and "worsted" as signifying all-wool underwear (pp. 100, 127, 158-159, 161, 164-165, 176, 181, 212, 233, 302).

Bearing on the medium of the retailer's salesmen, through which the manufacturers' labels pass, Mr. Anderson testified as to <sup>the</sup> policy of his company to educate "its salesmen to know the product that they are offering to the customer so that there can be no misrepresentation, with a fair amount of intelligence, but I do not believe it could be done" (p. 168).

Witness Levit, buyer of underwear, hosiery, and men's furnishings for Rothenberg & Co., New York City, and salesman with an experience of 28 years, in answer to the question if "the salesman may be innocently wrong at times," testified:

The chances are all the time, because he has no real knowledge of what goes into the garment (p. 89).

As to unscrupulous salesmen, witness Moses, manager of the Chain Shirt Shops, New York City, operating 38 stores of the city of New York and sixty-odd stores all over the country, testified:

If the customer seems to be somewhat ignorant and he asks the salesman, and he is anxious to make a sale, he had just as lief say it is pure wool to deceive the customer,

whether the label is there or not, and the label on there helps the salesman to get away with it (p. 177).

The witness Kaufman testifies that retail salesmen are guided in their representation as to the quality of garments by "their imagination and their guess" (p. 250).

The witness who represented this respondent on the stand, Mr. Gaylord, treasurer and general manager, testified:

Q. What was the object of adopting that sort of a label [merino] on that brand or type of goods?

A. Because it describes the fabric *known in the trade as a mixture of wool and cotton* (pp. 64, 147).

It will be noted that all through the preliminary statement of the Knit Goods Association's report the distinction is recognized. Thus it says, in explaining its adoption of the labels recommended: "We are, however, so jealous of the fair name of our industry and of our individual reputations for fair dealing that we have considered this complaint in the broadest way, with the sole object of freeing the industry from any abuses which may have been made of our labels by dealers over whom we have no control, *because of words used on labels which meant one thing to the manufacturer and dealer, but were capable of being misunderstood by the public.*" [Italics ours.]

To show the extremes to which the abuse and debasement of the term has been carried by manufacturers and the trade, the testimony of the witness Greenberg, a retail merchant, may be cited, showing that all-cotton underwear is labeled and sold as "merino" and "wool." The witness says:

"Merino," to one who understands it, is pure wool of the finest kind; but for years and years—I remember 35 or 38 years ago—when the box was labeled "Fine merino" it was the finest kind of pure wool. To-day it is nothing but the purest of cotton. There is no wool in it (pp. 212-213).

Mr. Cromwell, the chairman of the committee on labeling of the Association of Knit Goods Manufacturers of America, whose report is in evidence and discussed elsewhere, apparently was awakened to the evil possibilities of using trade terms for labels by the knowledge of such extreme abuse. He testifies:

Previously the trade point of view was the one I went on. When I woke up to the fact that they had gone so far as to put the words "natural wool" on the labels of all-cotton underwear \* \* \* (p. 369).

United States Treasury and court decisions cited by respondent obviously all relate to the trade use of the term. They involve questions arising under the customs laws and the classification of goods by the manufacturers and trade, which is naturally that adopted for the tariff schedules (p. 321).

As to the terms used by the Department of Commerce in its census of the knit underwear industry,

the witness Steuart, now Director of the Bureau of Census, and at the latest census available at the hearing, namely, that of 1914, chief statistician of manufacturers, explains just how the schedules on which these statistics were based were prepared by the adoption of the trade terminology. The Department of Commerce publications are taken from these census figures (pp. 361-362). -

(g) **Merino repudiated as misleading.**

Perhaps the strongest testimony from the trade itself as to the understanding of the public respecting the terms in question is the fact that the use of the word "merino" has been repudiated in connection with underwear by many of the leading dealers. *2 p. 13/11*

Thus Mr. Turnbull, president of the Rogers Peet Co., New York City, testifies as follows as to the reason for that company's dropping the use of "merino" on labels of underwear:

Q. Will you give the reasons which actuated you in making the change?

A. We found we had to. We had to instruct our salesmen. Some, of more experience than others, had known that "merino" is not all wool; but we instructed our salesmen what "merino" meant, and "Australian wool" and those other terms—that they did not mean all-wool. So we took the boxes that came from the manufacturers and put the garments in our own boxes that had no marks. Now, undoubtedly there are a few people in the public who have bought underwear for years who may understand it, but the average and

the vast bulk of them do not, and that is why we took this precaution (p. 181). \* \* \* It was so that we would not mislead the public (p. 184).

This proceeding or this Commission's activity had nothing to do with the dropping of the labels "merino," etc., which were repudiated long before (p. 184).

There appears in this the explanation of why some retailers, as testified by some of the witnesses, do not display the manufacturers' boxes. It emphasizes the effect of them in the hands of the retailers who place the manufacturers' boxes on their shelves and sell the garments from them. This is the practice (pp. 78, 137, 192, 222-223, 225, 228, 240, 245, 250, 269, 271).

This tells the story of the use made of these labels in the hands of unscrupulous retailers among the thousands in small city and country shops, including the "Schlag" shops referred to by the witness Leary, in his illustrations of the flagrant misrepresentations of retailers (pp. 96, 114, 301).

#### (h) Evidence of deception.

There is, moreover, in the record evidence of the deception of consumers in the purchase of underwear as labeled by petitioner (pp. 125, 223, 225, 234, 236, 267-268, 351, 380-382).

Thus, Mr. Goldheim, retailer and president of the Maryland and District of Columbia Clothiers and Haberdashers, states: "We never let a customer see them," referring to the labels on the manufacturers'

boxes (p. 237). This follows his testimony as to the deception practiced in connection with such labels as "Merino." He testified that there have been more than 50 times in his experience when the brand "Merino" was asked for and the inquirer supposed he was asking for all-wool underwear.

The witness Burkett testifies that he purchased undershirts bearing this respondent's brand, "Winsted Hosiery Company," in the collar, and from its boxes labeled "natural merino" and "natural wool," and that the salesman stated, and repeated, that they were all wool (pp. 349-351).

In answer to the question of what impression the purchasing public would get on entering a store and seeing on the shelves boxes labeled "Merino," he testified: "I should say the average unintelligent man would think he was buying wool garments, sir," and he characterized the labels "Natural wool," "Gray wool," "Australian wool," and "Natural worsted" as "absolutely misleading" (pp. 233-234):

Illustrating the use made of the labels in merchandising their goods by retailers and other salesmen, as testified to by the witness Goldheim (p. 234), cited above, the witness Crymes, proprietor of a men's furnishing shop, Washington, D. C., testified:

We try to convince them by the label on the box. That is the only way we have, \* \* \* you have to rely on the label on the box and its truthfulness to guide you as to whether you are correct or not (p. 225).

(i) **Recognition in the industry of the unfairness of this form of competition.**

Several witnesses drew the inference in their testimony that to label goods made partly of cotton with respondent's labels was unfair to manufacturers of all-wool underwear or those who used properly descriptive labels.

The witness Kuhn, president of the Stuttgart Underwear Co., which has been making underwear for 51 years (p. 205), was asked if it was his "judgment that the use of such terms as 'natural wool' and 'gray wool' and 'natural merino' on goods composed of wool and cotton, and in which sometimes the proportion of cotton is greater than that of wool, is unjust and unfair as a matter of trade practice to those who label their goods with the contents specifically."

A. I did state that, very emphatically, but I also said that while I considered that sort of thing unfair, it was the general custom and practice in the trade for a great many years, and of course I could not at this stage of the game remedy that condition (p. 209).

See also the opinion of the witness Morton, president of the Hanifen Co., of Philadelphia, one of the large manufacturers of all-wool underwear (p. 152), to the effect that the word "wool" should not be used on boxes containing garments made of cotton and wool because it "would imply to anybody" that it was all wool (p. 157).

## II. Competition.

- (a) The evidence contradicts and supersedes the prior stipulation of fact on which the court below apparently relied.

The chief error of the court below is in the apparent assumption that all manufacturers of mixed cotton and wool underwear use labels in like manner as respondent. While the agreed statement of facts, paragraph 7, recites that the practice of using such labels as those of the respondent on underwear not composed wholly of wool "is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein," the evidence and the findings based thereon, which take the place of this stipulation of facts, contradict this sweeping statement absolutely. (Findings 21-24, pp. 44-45)

### ~~Appendix.~~

It should be remembered that the relation of the Commission to the matter at issue is not that of a party in private litigation, but that of an agency of the Government charged with passing on trade practices in the interest of the public and establishing the actual facts on which to base its action. The provision of the act for the taking of additional evidence is clearly intended to secure this and prevent a miscarriage by failure of evidence covering essential facts. In connection with the history of the adoption of the agreed statement of facts, indicated above in the statement of the case, and in view of the wholly different facts established by the additional evidence taken, the case affords a good illustration of the value of the provision. The provision that the new or



modified findings shall constitute the case is only in accord with the whole nature of the proceeding, as one to establish the facts in the public interest.

(b) Respondent competes with manufacturers of (1) all-wool underwear, and (2) underwear composed of cotton and wool not labeled "Merino," "Wool," or "Worsted."

It appears from the evidence that the underwear manufactured by the respondent, composed of cotton and wool, is sold in competition (1) with all-wool underwear, domestic and imported, under labels such as "All wool," "Natural wool," or "Wool," or under a trade-mark with no descriptive terms; also (2) with cotton and wool underwear of domestic manufacture bearing no description of the materials of which they are composed, but under the private trade-mark or brand of the manufacturer or retailer, or under the labels "Cotton and wool" and "Part wool," or under labels consisting of the trade-mark and terms, such as "fine" and "superior"; and with cotton and wool underwear imported under such labels as "Wool and cotton."

This proof consists of the testimony of a number of manufacturers and dealers who handle underwear.

It is obvious that the respondent's goods labeled "Merino," "Wool," etc., come into competition, so far as the public understands these terms to mean all wool, with the genuine all-wool products, domestic and imported. The lines of underwear made wholly of wool which carry no descriptive labels are manifestly subject to such competition as well as those

which are labeled to indicate their quality. The unfairness of such competition is manifest.

While considerable all-wool underwear is imported, the volume is small as compared to the amount of all-wool underwear of domestic manufacture. The figures taken in the census of 1914 (the latest available) of the manufacture of underwear in this country, as explained by the witness Steuart, chief statistician for manufacturers, Bureau of Census, indicate that some 20 per cent in volume and 27 per cent in value of the whole product of underwear made entirely or partly of wool is all wool (Ex. 29, pp. 428, 361-2).

As instances of individual all-wool manufacturers, the witness Miller, president and general manager of the W. E. Tillotson Manufacturing Co., testified that that company has manufactured all-wool garments for 40 years (p. 357); that its normal output of underwear is about \$1,600,000 a year, and that about 76 or 77 per cent of that was all-wool garments (p. 359); that on such all-wool underwear the labels "Natural wool," "Fine natural wool," "Random natural wool color," and "Natural wool random" have been used on the containers of all-wool garments manufactured by this company for some years prior to 1919, the period covered by the complaint herein (pp. 357-358).

(c) Same terms as used for all-wool garments.

It will be noted that this illustrates the use by the respondent on cotton-and-wool garments of the

precise combination of terms employed by manufacturers of all-wool underwear, namely, "natural wool," in addition to the unfair competition presented by it with the use of the generic term "wool" by all-wool manufacturers.

Mr. Miller named as other domestic all-wool manufacturers the Wright Knitting Co., Jaeger, the Vassar Knit Goods Co., the Lake Mills, the Ypsilanti Knitting Mills Co., as those that came to his mind at the moment. Other domestic manufacturers of all-wool underwear who were represented by witnesses are Hanifen Co., The Medlicott Co., which has made all-wool underwear for the last 10 years, and George Rockwell Co. (pp. 153, 339, 357-358).

The witness Morton, president of the Hanifen Co., of Philadelphia, testified that his company's average annual sales for the past five years had amounted to from \$300,000 to \$500,000, of which about one-third was underwear and of the latter about one-half was all wool. He adds, "We sell all over the United States" (p. 358).

Respondent's counsel has sought in the taking of testimony on this phase of unfair competition presented (namely, with all-wool underwear) to make it appear that all-wool underwear as sold by the manufacturers is distinguished by being labeled "All-wool." If this were the case, it might well be argued that the abuse of the word "wool" by applying it, as in the case of respondent, to goods made partly of cotton, had driven manufacturers of all-wool garments to the use of "all-wool," without

changing the fact that the proper use of "wool" as used by the respondent is still in force with most people as meaning nothing but wool. But it appears that the use which the respondent seeks to establish of "all-wool" by manufacturers of all-wool garments is not universal, but that "wool" is used alone by them in its proper sense (pp. 155-156).

As to competition with imported all-wool underwear, a number of witnesses representing large dealers in New York City testified that they had handled such underwear under such labels as "Wool," "Natural wool," "All-wool," "Lamb's wool," or trade names such as "Demophile" and "Two Steeples" without descriptive terms (pp. 90-91, 110, 128, 139, 140, 165).

In the field of competition with underwear made partly of wool and partly of cotton, imported and domestic, the evidence shows that (1) a large part of such competing goods have been manufactured and sold without any descriptive labels but under a firm or trade name only, making no representations as to their composition; (2) that a part has been manufactured and sold under labels which indicate specifically, or generally, their mixed composition, as "Part wool," "Wool and cotton," or "Cotton and wool," according as wool or cotton predominated; and (3) under labels signifying grade or quality only, but not composition, such as "Excellent" or "Superior," and fanciful or coined terms, besides a variety of combinations of descriptive and nondescriptive terms, different from petitioner's labels, which respondent and other

manufacturers have been accustomed to place on the containers to suit the wish of individual customers (p. 154).

It appears there is an important and growing element of manufacturers of mixed underwear who use no descriptive terms. This has been the practice of the Wright (p. 118), Munsing (pp. 173-174), and Reis (p. 145), among the most important manufacturers or distributors of underwear in the country. Hanifen & Co. and Stuttgart and other important manufacturers use no descriptive words (pp. 156, 176-177, 206). The cotton-and-wool underwear produced by these manufacturers are marketed only under their firm or trade name (pp. 66, 90-91, 97, 134, 135, 139, 142, 171, 689).

The witness O'Neill testified that imported mixed underwear is marked "cotton and wool," and that some manufacturers omit descriptive labels and some specify cotton and wool (pp. 90-91). The witness Meyer, representing Franklin, Simon & Co., New York City, testified that mixed goods are not labeled at all (p. 97). The witness Lyon, Wanamaker's, testified that mixed underwear is labeled by his house "cotton and wool" (p. 134), and that imported mixed garments come in boxes labeled "Cotton and wool" (p. 135). The witness Buteaux, Brown, Durrell & Co., New York City, testified that the mixed underwear formerly handled by his house was marked "part wool" or "merino," and is now marked "cotton and wool" (p. 171). The witness Rosenberg, Altman's, New York City, testified that imported

mixed underwear is labeled "Gauze merino" (p. 139). Altman's does not use "merino," but advertises mixed underwear as "cotton and wool" (fol. 689). The witness Hooper, Gimbel's, testified that imported mixed underwear is labeled "Wool and cotton" and "Cotton and wool" (p. 142). The witness Reis testified to the use of "coined" labels (p. 66). The witness Moses testified to a line of mixed underwear sold under the label "Superior" alone (p. 176).

(d) Respondent's claim refuted by the trade's spokesman.

Respondent's counsel sought on cross-examination to get assent to its general proposition, as to the general use of its label on like goods by incorporating it substantially as pleaded in its answer, in his questions to witnesses. In some cases the witness accepted the very sweeping and general language put into his mouth, but how much such testimony is worth is shown by the specific evidence given above. The statement of the witness Lincoln Cromwell, with whom this was tested on redirect examination, may be cited in general refutation (pp. 366-367). He explained that he prepared the report of the committee on underwear of the Knit Goods Manufacturers of America, and had examined the labels referred to in the passage, as to labels used on mixed cotton-and-wool underwear, and that it was based only on the evidence supplied by certain mills.

Q. And you are familiar with the particular labels referred to as being set out in this complaint against the Winsted Co.?

A. Yes; I had a collection of them.

Q. You don't mean to make it appear from that statement which you have read that these particular labels complained of were used by all manufacturers of underwear?

A. No; they were used by the particular mills who furnished them to me and who have been cited by the Commission as practicing unfair methods of trade.

Q. So that this I have read relates to the labels of the particular mill?

A. As to those particular mills; yes.

Q. You know as a fact, do you not, that various manufacturers of underwear use no descriptive labels?

A. Some use no descriptive labels; yes (pp. 366-367).

It appears from the above that the general statement in the committee's report referred to is based on the evidence of the use of labels by the very companies which the Commission had proceeded against because they were using the same labels as the respondent, as the latter had called to the attention of the Commission. But these were a mere handful among all the respondent's competitors.

It is submitted that the evidence of competition, detailed above, fully supports the findings numbered 21-24, in which it is summarized by the Commission and which the court below has apparently ignored.

## THE LAW.

**I. Construction of the term "Unfair methods of competition."****(a) Interpretation of the law by the Supreme Court in the Gratz case.**

The broad and comprehensive language of the substantive part of the Federal Trade Commission act, "unfair methods of competition in commerce are hereby declared unlawful," has received some interpretation by this court in the case of *Federal Trade Commission v. Gratz* (253 U. S. 421).

The majority opinion confines the decision expressly to a question of the sufficiency of the complaint. It says:

The judgment below must be affirmed since, in our opinion, the first count of the complaint is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the fair intendment of these words. We go no further and confine this opinion to the point specified.

In support of this conclusion it makes these general indications as to the limitation of the application of the phrase "unfair methods of competition":

The words "unfair methods of competition" are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public



policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade. (*Federal Trade Commission v. Gratz, supra*, p. 427.)

While this statement is negative in form, it serves to define the boundaries within which acts must fall to be within the condemnation of this statute. They mark out three great classes of trade practices within one or more of which offenses against the act must fall: (1) Practices which heretofore, at some time in some way, have been regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression; (2) practices against public policy because of their dangerous tendency unduly to hinder competition; or (3) create a monopoly.

Canceling the double negatives, the proposition of the court may be stated in the affirmative as follows: "The words 'unfair methods of competition' are applicable to practices heretofore regarded as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

It is not understood that the language of the court, "practices never heretofore regarded as opposed to good morals," etc., necessarily means that for any particular practice to fall within the act it must have been passed upon by the courts and condemned, but that it must fall within a class condemned by the common moral standards of society which have been

recognized and enforced in the principles of law as administered by the courts.

Indeed, in the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men.

(*Curtis Publishing Co. v. Federal Trade Commission*, 270 Fed. 881, 908.)

Both from the standard of general public morals and from the legal point of view the practice of misbranding must be held to come within the category of acts "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud." The basis of this charge (like those of passing off at the common law) is deception of the public, resulting in injury to competitors. It may, also, plainly be held to be within the category of acts having a "dangerous tendency unduly to hinder competition"; certainly the practice is not one of "free and fair competition, as commonly understood and practiced by honorable opponents in trade," which the court indicates should go unfettered.

On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners representing the Government as *parens patriæ*

are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This prima facie reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the Commission and the courts to a prescribed list of specific acts (Cong. Rec., 63d Cong., 2d sess., pp. 13, 18, 533, 12246). And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914, condemning certain specific acts. (*Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307.)

(b) History of the legislation.

The legislative history of the Federal Trade Commission act shows that it was the intention of Congress to make all unfair methods of competition unlawful, and to regulate competition rather than solely to prevent monopoly. It is, of course, well settled that a court will not consult debates to contradict the plain language of an act. The history of the

legislation does not contradict, but confirms, the natural construction of the statute.

There was considerable debate on the question whether the definition of unfair methods of competition in section 5 should be made more specific in the Senate, on Senator Reed's amendment having that purpose. The reasons for not taking this course were stated a number of times (see, for example, statements of Senators Newlands, debates, Record, 63d Cong., 2d and 3d sess., p. 11084; Cummins, pp. 11103-11104, 11452-11453; Robinson, p. 11231; Lewis, pp. 12925-12926; Clarke of Arkansas, p. 11453; Kenyon, p. 13157; and of Judge Covington, p. 14931; for the debate on Reed's amendment see debates, pp. 13100; 13224-13235; 13310-13314.)

Briefly, the reason for not attempting to define specifically the practices intended to be made unlawful was that the Congress was determined to make *all unfair methods* in interstate commerce unlawful, and it was feared that any attempt at definition would narrow the scope of the act. This was said, in substance, in the report of the Senate committee, in the report of the committee on conference, and many times in the debates. The report of the House conference committee contains this expression of it:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at

once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country, etc. (Record, 63d Cong., 2d sess., p. 14924; House report No. 1142, p. 19.)

The Senate committee report said:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law, it would be quite possible to invent others \* \* \*. It is believed that the term "unfair competition" has a legal significance which can be enforced by the Commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. (Senate report No. 597, 63d Cong., 2d sess., p. 13.)

That the prevention of monopoly by the prevention of those acts which tend to produce it was one of

the purposes of the act is not questioned. It is an error, however, to suppose that this was the sole purpose. It is more correct to say that the principal purpose of the act was to preserve fair and honest competitive conditions in interstate commerce, and when expressed in that way, it can readily be seen that many things might properly be included besides the prevention of monopoly. For instance, the "Cummins report," which was an important early step in the evolution of the present law, expressed this idea clearly. (Senate Rept. No. 1326, 62d Cong., 3d sess., pp. 2, 3, 4.) The report of the House Committee on Interstate and Foreign Commerce on the bill contains the following language:

The administration idea, and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce. (House Rept. No. 1553, 63d Cong., 2d sess., p. 2.)

Representative Stevens, the ranking Republican member of the House committee in charge of the bill, and a member of the committee of conference, said:

\* \* \* Where there is a practice or a class of practices which has for its main purpose an injury to the public by eliminating competition which ought to exist in the public interest, in such cases it is a fraud on the public, both as to purpose and results. If it be for the public interest to preserve healthful competition, then it is our duty to provide the means for it.

The essence of the practice must be ascertained by the Commission. If the general

purpose and result of it will be to the detriment of the public by eliminating competition, which in the public interest ought to exist, *or by injuring those who ought not to be injured*, by driving out of business that which ought to be sustained and protected in the interest of the general public, then it is fraud against the public and ought to be repressed. (Debates, pp. 14937-14938.) [Italics ours.]

Senator Cummins, after specifying "that competition which is designed to destroy competition or eliminate a competitor and to bring about monopoly," added: "Any vicious practice or method in competition that injuriously affects the public welfare, even though not unlawful under the Sherman law" (ib., pp. 11236, 11456, 11529), and when asked to give an example cited a typical case of "passing off."

Senator Robinson, after specifying the "passing off" of goods and Prof. Steven's classification, added: "Oppression or advantage obtained by deception or questionable means and which 'normal business men' recognize as unfair" (ib., pp. 11107, 11126-11131), and "every practice which may be held by a court to be unjust, inequitable, or dishonest" (ib., p. 11593).

Representative Stevens thought the foundation of section 5 was the law of fraud, and expressed his belief that "fraud in some form is the basis and essence of unfair competition." (Debates, p. 14936.)

He also said, in part:

. We made a change in the definition of the Senate bill, and instead of using the words

"unfair competition," which signify a general course of conduct, we prohibit all "unfair methods of competition." In this way that prohibition should attach to the particular act such as that to which the gentleman from Wisconsin alluded. That is the very reason we made this change, which has been so criticized; because we wanted to cover the specific act which would be fair. In that way we meet the public exigency in classes of cases like that we have discussed. (Debates, p. 14937.)

The second paragraph of section 5 of the Federal Trade Commission act established the Commission's jurisdiction for the enforcement of the rule already laid down as follows:

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

The jurisdiction is manifestly as broad as the substantive law. The authorities which have been cited in support of the broad and liberal construction of the first paragraph apply with equal force to the second.

In the third paragraph of section 5 the act provides the procedure by means of which the Commission is to prevent the use of unfair methods of competition:

Whenever the Commission shall have reason to believe (that is, after a preliminary investi-



gation) that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public*, it shall issue and serve, etc. [Italics ours.]

Congress chose to make all unfair methods of competition in commerce unlawful and then to vest the Commission with a discretion not to proceed unless the public interest should appear.

Here we find emphasized the point that the Commission's action is primarily in the interest of the public. Here we have the very foundation of section 5 of the Trade Commission act.

(c) **The public interest.**

There are two salient aspects of this legislation which bring the present case within its scope: One, the comprehensiveness of the language "unfair methods of competition," and, second, the institution of a special Government agency to administer the law, initiate the proceeding, and apply the remedy prescribed. Taken together they proclaim the fact that it was the public interest which Congress had in mind. This purpose of erecting an administrative governmental body to prevent unfair practices in trade enlarges the natural interpretation of "unfair methods of competition" to include whatever might be against the public interest as obstructing the channels of fair competition, on the preservation of which the policy of the Congress is firmly based.

The language "unfair methods of competition in commerce are hereby declared unlawful" is unlimited. It would be no broader if it had read "*all* unfair methods," etc.

As to any construction which would confine this legislation to cases arising under the antitrust acts, or to the forms of unfair competition already entertained by the courts of law or equity between private litigants, the Congress will hardly be deemed to have intended to erect a special commission for the administration of these matters by another procedure; certainly not such matters alone. It may be noted that this court in framing its decrees in cases arising under the Sherman Act has found it necessary to embrace a variety of practices which in themselves would not amount to restraints of trade or monopoly but which it was essential to prevent in order to make effective the judgment based on the larger offense, as contributory to it.

The practice of so branding underwear that garments in which there is much cotton are purchased for all wool disturbs the normal development of the great woolgrowing interests by lessening the consumption of wool, and it affects in like manner thousands of farmers who are interested to a more limited extent in the production of wool. Moreover, it concerns the public health, for in the colder regions of the north and northwest all-wool underwear is a necessity for protection, and garments adulterated with cotton expose wearers in those climates to serious

danger, and they are necessarily deceived by such misbranding into the belief that the goods are all wool.

## **II. The elements of "unfair competition" as known to the common law present.**

### **(a) Analogy of present case to "passing off." Injury to competitors through deception of public.**

It is submitted, as argued elsewhere, that the Federal Trade Commission act established a Commission whose jurisdiction or province is limited only by the language of its charter, viz, "unfair methods of competition" in interstate commerce, the rule given by the Congress for the Commission to administer. The fact of the legislation itself speaks for its having for its field some special function not provided by the pre-existing antitrust laws, and not confined to the pre-existing causes of action and remedies provided by the courts. The refusal of the Congress to specify the forms of unfair competition because they could not all be enumerated, either actual or potential, and the avoidance of the phrase "unfair competition" as being identified with a particular cause of action known to the law, as disclosed in the debates, etc., strongly support this interpretation. But, while it is distinctly contended that the phrase "unfair methods of competition" in the statute has no limitation to "unfair competition" as the technical cause of action known to the law, otherwise "passing off," it is submitted that the practice constituting the cause of action of "unfair competition" or "passing off" may be regarded as an unfair method of competition, and

further that the practice alleged in this proceeding has all the essential elements that make "passing off" or "unfair competition" an unfair method of competition. The analogy between the present case and one of "unfair competition" in a court of equity is so close as to be illuminating in applying the test of an unfair method of competition here, the only difference being that for the individual private right of the complainant in passing off is substituted that of a large and indefinite class of competitors and the public interest is correspondingly enlarged.

The essential elements of unfair competition as known to the common law are deception of, or fraud on, the public and consequent injury to competitors. The cause of action seems to be based primarily on the protection to be given to a producer's property right in a trade mark or name, or in the good will attached thereto, against one who simulates them so as to confuse the public and to pass off his goods for another's. It is essential, as the basis of the injury to the complainant, that the deception of the public, or the likelihood of such deception, be shown.

While in the form of the instant proceeding no individual producer is complainant, and no specific individual private injury to property rights is set up, such injuries to competitors of the respondent collectively who do not misrepresent follow inevitably from the misrepresentation of respondent's labels. The practices complained of affect a class of competitors and not an individual competitor, whose

trade mark or name or product is simulated. It is a peculiar jurisdiction which this Commission has been given by the statute, to suppress unfair competition, in behalf of the public, because unfair competition, or methods of unfair competition, interfere with and restrain fair competition by misrepresentation and deception of the public, who buy the spurious for the genuine at the expense and injury of the whole class of honest manufacturers.

In a proper case of unfair competition, or passing off, at common law, the public is involved, and its deception is essential to the action. The two cases involve the same elements, viz, misrepresentation and deception of the public and consequent injury to a competitor ~~by~~ competitors who practice the deception. It is a circle, in which in one case the individual competitor's injury is the point of entrance or beginning, and in the other the deception of the public, which leads to the injury of an indefinite class of competitors. In the former case the competitor's interest is individual and the public's correspondingly narrow; in the latter case the competitors' interests are many and the public's interest correspondingly extensive.

In a sense, and a real sense, the representation that goods made of cotton and wool are all-wool is causing one man's goods to be taken for those of another by the public—that is, those of the cotton-and-wool manufacturers for those of the all-wool manufacturers; these, while a class, are determinable and identifiable at any particular time.

On the principle that for such injury as exists in cases of unfair competition equity has an appropriate remedy, but limited to the protection of individual property rights, it may be argued that the legislation creating this Commission authorized it to intervene in behalf of the class of competitors injured in such a case as this, to protect them from unfair competitors and the public from the results of the fraud and imposition which constitute the unfair competition.

**(b) The manufacturer is responsible to the public. Deception of the dealer is immaterial.**

That the manufacturer does not deal directly with the public does not change the fact of his responsibility for any misleading effects which may be given to his labels which he places on his product. If it be assumed that the retailer who deals directly with the public was not deceived by the labels, it can not be presumed that he would correct the deception so far as it would otherwise result to the public. The manufacturer sends out his goods under a misleading label and in this proceeding the probability that deception of the public flows from his act, exists, and is a sufficient basis for the preventive order of the Commission. The deceptive character of the label being granted, its natural and reasonable effect will be presumed, and it is not necessary to show actual collusion of the manufacturer with the retailer to deceive the public.

It is well settled that the manufacturer who puts in the hands of the immediate purchaser

the means of deceiving the ultimate purchaser is chargeable with unfair competition. The possibility that the retailer may not be honest in such matters must be taken into account by the manufacturer. The courts would be without power to give aid in a large number of these cases were their right to grant relief limited to cases in which the immediate customer is deceived. Whether "the trade"—jobbers and retailers—are deceived, is not the question. English decisions are most emphatic on this point \* \* \* American cases are numerous which are equally emphatic. (Nims on Unfair Competition, sec. 381, citing *N. K. Fairbanks Co. v. R. W. Bell Manufacturing Co.*, 77 Fed. 869-878, C. C. A. 2d Cir.; *Scriven v. North*, 134 Fed. 366-375; *Coca Cola Co. v. Gay Cola Co.*, 200 Fed. 720, 722, 723.)

In *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154-155, involving simulation in containers, Judge Holmes said the defendant contended he "did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It can hardly be doubted that they contemplated that the wholesale dealer, at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior use, would or might try to deceive the public, and whether they did or not is immaterial."

In applying the rule it is to be borne in mind that the likelihood of deception is not confined

to the dealer (who would likely be able to distinguish); but the rule primarily seeks to protect the ordinary purchaser, or, in other words, the liability of the ultimate consumer to be misled, must be reckoned with. (*Fuller v. Huff supra*, 211 Fed. 610, and cases cited; *Florence Mfg. Co. v. Dowd, supra*; *Scriven v. North, supra*; *Coca Cola Co. v. Gay Ola Co.*, 200 Fed. 720; *International Silver Co. v. Rogers Corporation, supra*.) Indeed, the rule would be of little practical use if it could be avoided by showing that dealers would not be deceived; for then the dealer could unrestrainedly perpetrate deception upon the ultimate consumer. So the courts have wisely required that the manufacturer must, in the first instance, take such precautions as will make it fairly impossible for a dealer to deceive an ordinarily cautious customer. (*Rubber & C. H. T. Co. v. F. W. Devoc & C. T. Reynolds Co.*, 233 Fed. 150, 157.)

The ultimate purchaser is the one in view, and it is sufficient if he is likely to be deceived. The manufacturer or wholesaler is liable for deception practiced by a retailer to which he has contributed by affording the means and opportunity for the deception of the purchasers, although the retailer himself was not deceived. (38 Cyc. 778 and notes 24 and 25 citing authorities.)

No doubt no one who bought from defendant was ever deceived. No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as



well as the middleman. It is due him more than to the jobber or wholesale purchaser that the various indicia of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude a consuming purchaser by simulating some well-known and popular style of package  
\* \* \*

See also *Reed v. Richardson*, 45 Law T. (N. S.) 54; *Brown v. Mercer*, 337 N. Y. Super. Ct. 265; *Singer Manufacturing Co. v. Long*, 18 Ch. Div. 412; and *Lever v. Goodwin*, 35 Ch. Div. In the latter case the rule is well stated, as follows: "It has been said more than once in this case that the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shopkeeper or the shopkeeper's assistant. But that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers." (*N. K. Fairbanks Co., v. R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 868-878).

*Rubber & C. H. T. Co. v. F. W. Devoe and C. T. Reynolds Co.*, *supra*, *E. B. Estes & Sons v. Geo. Frost Co.*, 176 Fed. 338, 340; *Coca Cola Co. v. Gay Cola Co.*, 200 Fed. 720, 722, 723.

- (c) Only ordinary purchasers, including the unwary and ignorant, need be misled.

Since an "unfair method of competition" resting on misbranding and based primarily on the public's deception involves and is bound up with injury to

competitors by confusion of goods in the public mind, the rule in "unfair competition," or passing off, which turns primarily on injury to a competitor, applies. The rule is thus stated in the case of *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357 at 366 as follows:

In determining whether what he is doing or has done in either of these ways amounts to such a representation, and therefore constitutes unfair competition, the test is whether it is calculated to deceive intending purchasers of such goods—that they are the goods of the first comer. It is not necessary that it should be calculated to so deceive first or intelligent purchasers. It is sufficient that it should be calculated to so deceive ultimate or ordinary purchasers, and ordinary purchasers include incautious, unwary, and ignorant purchasers.

In our opinion the evidence is insufficient to show actual deception. Such proof, however, is not necessary. The question is whether the natural and probable result of the use by defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions, whether there is a degree of similarity calculated to deceive. (*Notaseme Hosiery Co. v. Straus et al*, 201 Fed. 99-100).

The misleading quality of a practice is not to be tested by its effect actual or probable upon the skilled or experienced buyers in the trade. The true test is the impression produced upon the unskilled and inexperienced

public. (*Photo-play Publishing Co. v. La Verne Pub. Co.*, 269 Fed. 730)

*Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. 603, 610; *Winterton Gum Co. v. Auto Sales Gum Co.*, 211 Fed. 612-617.

Vendors are not permitted to entrap the ordinary, careless, and ignorant (*Royal Baking Powder Co. v. Donohue*, 265 Fed. 612, 617, citing *Houston v. St. Louis Packing Co.*, 249 U. S. 479).

It is to be observed, moreover, in testing the charge of infringement, as well as that of unfair competition, consideration must be given to the question whether the resemblance so far dominate the differences as to be likely to deceive ordinary purchasers; and the purchasers most to be considered are the ultimate users, rather than jobbers and retailers, since they, like all middlemen, are interested in and have the means of identifying the manufacturers of the goods they purchase. (*O. & W. Thum Co. v. Dickinson*, 245 Fed. 609-613, and cases cited.)

### III. The probable effect, not the intention, governs.

#### Rules of law in passing off apply.

The analogy between this proceeding and a suit in equity to enjoin <sup>an</sup> fair competition would seem to hold as to the several propositions stated below, namely, that proof of intention to deceive is not necessary, or of deception of the retailer or other immediate purchaser from the manufacturer, but only probable deception of the ordinary consumer. A distinction may be made in applying the following rules in favor of this proceeding, on the grounds that it is preventive of the means or methods that lead

to unfair competition, and, since it is primarily in the public interest, it should turn on the probable effect of the practices charged on competitors and the public and not on the question of intent, or of deception of the middleman with whom respondent deals directly. If the propositions noted apply to suits for unfair competition between individuals, they apply *a fortiori* to this proceeding.

The proceeding is strictly a preventive measure taken in the interest of the general public.

What section 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair methods of competition"; that is, the method or means by which an unfair end *might be accomplished*. The Commission was directed to act if it had reason to believe that an "unfair method of competition in commerce has been or is being used." (*Federal Trade Commission, Petitioner, v. Gratz*, *supra*, minority opinion, at p. 441). [Italics ours.]

It is a question of preventing, by the Commission's order, practices or methods which may in reason cause the results of unfair competition, before its effects are realized, and it is not necessary to show the accomplished fact of *unfair competition*.

*Beechnut Co. v. Federal Trade Commission*, 264 Fed. 885, 890; opinion of Manton, J., concurring.

*Federal Trade Commission v. Gratz et al.*, 258 Fed. 314, 317.

*Sears, Roebuck & Co.*, 258 Fed. 307, 311.

## (a) Proof of actual intention to deceive not essential.

It is now well settled that intention is not a necessary element for enjoining unfair competition. The reason is that the action is not punitive, and both from the public's and the plaintiff's point of view intention makes no difference so far as the results are concerned. So the distinction which at one time had authority, that while in a case of infringement of a trade-mark the proof of intention to pass off goods as those of another was not necessary, in cases of passing off generally, it was, has been superseded as indicated on the grounds stated.

It has been uniformly held in the various circuits that it is not necessary that actual intent to defraud be shown. (*Van Houten v. Hooten, etc., Co.*, 130 Fed., 600.)

This doctrine follows from the general proposition announced by this court, that "the common law of trade-mark is but a part of the broader law of unfair competition." *Hanover Milling Co. v. Metcalf*, 240 U. S., 403, 413.

This is the law in England: <sup>Herby</sup> ~~Curley~~ on Trade Marks, p. 482; *Cary Sons v. Crisp*, 19 R. P. C., 497; *Birmingham Small Arms Co. v. Webb*, 24 R. P. C., 27; *Powell v. Birmingham Vinegar Brewing Co.*, 2 Ch. 54.

The rule then, as I understand it, is that if one uses a word or words, which have acquired the secondary meaning beforementioned, in such a way as would be likely to deceive the public in believing that his goods are those of another, that it will be conclusively presumed

that he intended to deceive and injure. If the presumption were rebuttable, and made to depend upon the actual intent of a party, in many cases the courts would be powerless to prevent deception, and to afford a remedy for what, in reality, would be a wrong. (*Rubber & C. H. T. Co. v. F. W. Devoe & C. T. Reynolds Co.*, 233 Fed. 150, 157.)

(b) Actual deception or damage need not be shown.

Since the proceeding is preventive—prophylactic legislation for commercial ills—it follows that it need not rest on proofs of actual deception and consequent damage and injury from an unlawful practice, but it is enough to show that there is reasonable probability that they will follow.

The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived, but their function is to “stop all those trade practices that have a *capacity or a tendency* to injure competitors directly or through deception of purchasers. (*Sears, Roebuck & Co. v. Federal Trade Commission*, *supra*.)

The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory. (*National Harness Manufacturers Association of the United States of America v. Federal Trade Commission*, 268 Fed. 705, 713.)

Beechnut Co. v. Federal Trade Commission, 264 Fed. 885, 890.

As in a case of unfair competition, it is not necessary that actual deception be proved if it is clearly inferable as the natural result of the defendant's acts.

In our opinion the evidence is insufficient to show actual deception. Such proof, however, is not necessary. The question is whether the natural and probable result of the use by defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions, whether there is a degree of similarity calculated to deceive. (*Notaseme Hosiery Co. v. Straus et al.*, 201 Fed. 99-100.)

In *Rubber & C. H. T. Co. v. F. W. Devoe & Co.*, 233 Fed. 150, 156, the court says:

The rule in New Jersey and that prevailing in England is thus stated by Vice Chancellor Howell in the Rubber-Bound Brush Co. case, 81 N. J. Eq. 242: "It is not necessary that the complainant in order to succeed should prove misrepresentation or actual fraud by the defendant, or give any evidence that any single person was deceived. It is enough if in the opinion of the judge the symbol or device or get-up used by the defendant is one which so closely resembles the symbol, device, or get-up used by the complainant as to be likely to deceive the public." See also *International Silver Co. v. Rogers Corporation*, 66 N. J. Eq. 129.

As in the case of infringement by laws taken of another's trade-mark, the true test of unfair competition is whether the acts of defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates. This has been said to include the incautious, unwary, or ignorant purchasers, but not careless purchasers who make no examination. (38 Cyc. 775-777.)

The universal test is whether the public is likely to be deceived. (38 Cyc. 780, citing *Knickerbocker Chocolate Co. v. Griffing*, 144 Fed. 316, *Hygia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139; *affd.*, 151 Fed. 10.)

#### IV. Disposition of the courts to protect the public interest.

The history of the law of unfair competition shows a steady broadening from the protection of the exclusive property right in a trade-mark to the protection of the good will in a name against those who seek by borrowing the name to which it is attached to use it for themselves to the loss of the original user. As this development of the law has progressed, the importance of the element of the public's interest in not being imposed upon has increased as that of the individual who invokes the court's action has receded.

Thus the Circuit Court of Appeals for the First Circuit has said in the case of *E. B. Estes & Sons v. George Frost Co.*, 176 Fed. 338:



The whole trend of modern decision is in the direction of making it clear, whether in respect to food, drink, or wearing apparel, that placing adulterations and imitations upon the market, with the purpose of deceiving members of the public who buy, as they do oftentimes upon casual inspection, into buying something for what it is not, is a business which is not countenanced by the law, and when with such a deceptive purpose things are brought into situations of competition with the genuine that the competition is unfair. Such rules of law are in a large sense based upon the idea that the public in its relation to business and business in its relation to the public, in respect to the necessary and useful articles of life and trade, ought to have such protection as results from fair competition. And it follows that if one business concern has created, advertised, and sold a particular thing which proves to have intrinsic natural or inventive merit, which commends itself to the public under actual continuous use, that if another business concern conceives the idea of making something not possessing this merit at all, but making it so nearly in resemblance as to deceive members of the purchasing public into buying it, it not only becomes an imposition upon the public but an imposition upon the rightful business of the one whose goods are imitated, and the imposition results from what, in law phrase, is called unfair competition.

The rule as to unfair or fraudulent competition does not necessarily involve the right

to the exclusive use of a word or symbol, for though one trade-mark may be invalid and the circumstances attending its use by another may be such as to constitute an invasion of his rights and a fraud upon the public. It proceeds upon ethical consideration and has its foundation in business honesty. The evil against which it is directed has a twofold aspect, the deception of the purchasing public and the consequent piracy of the reputation and good will which a competitor has earned by fair conduct and the quality of his goods and which constitute a valuable asset in his business. (*Trinidad Asphalt Manufacturing Co. v. Standard Paint Co.*, 163 Fed. 977-980, Affd. 220 U. S. 446.)

In *Kinney v. Basch* (16 Am. Law. Reg. (N. S.) 596) the court said:

It has been urged upon the part of the defendants that geographical names can not be the subject of a trade-mark; neither can numerals, which only serve to indicate the nature, kind, and quality of an article. It is true that the cases cited by the defendants sustain these propositions, but later cases have proceeded upon different and more equitable principles in defining the grounds upon which courts of equity interfere in cases of this description. This interference, instead of being founded upon the theory of protection to the owner's trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols is adopted for the purpose of

defrauding the public, the courts will interfere and protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals, or symbols. This doctrine is fully supported by the latest English cases of *Lea v. Haley*, 5 Ch. App. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and also in the case of *Newman v. Alvord*, 51 N. Y. 189.

In the case of *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, the court went so far as to enjoin, at the suit of a number of flour manufacturers of Minneapolis, Minn., a dealer in flour manufactured in Milwaukee from using the labels or brands "Minneapolis" or "Minnesota" on the ground that all the flour manufacturers of Minneapolis, including the complainants, had a right to the use of these names on flour manufactured in Minneapolis as against all flour manufactured elsewhere, because of the reputation which Minneapolis flour had acquired through the early introduction there of improved processes. An injunction had been refused by the court below on the ground, beside the absence of exclusive interest in the names, "that the misuse of these words by the defendant can not injuriously affect any one particular complainant, because they do not imply that anyone in particular of the defendants manufactured the flour sold by the defendant," as stated by the appellate court.

The court stated that the defendant might have continued to buy Minneapolis flour and by branding

it so enjoy all the benefits which such marking would give him in the market—

because he would be adhering to truth and fair dealing. But when he placed these same brands upon another flour, manufactured in Wisconsin, he departed from the truth and placed a lying brand upon his goods, which was intended to deceive, *and could not but deceive, the public, and result in injury to the complainants' business.* If the defendant could do this, all other persons could do the same thing, and so the public would be defrauded, and the good will and business of complainants, which has taken 39 years to build up, would be greatly impaired if not destroyed. If this could be permitted, there would not be much incitement to provide the public with a high grade of flour such as the complainants have been manufacturing for many years, and which the evidence shows has led the markets of the world, if, by all manufacturers using the same brand, the complainants' flour may be confounded with all lesser grades and kinds made from all sorts and grades of wheat. It must be conceded that, if the private interests involved are great, the public interests are no less so. [*Italics ours.*] (*Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, 617-18.)

The court also quoted from the case of *Anheuser-Busch Brewing Association v. Piza*, 24 Fed. 149.

(a) Misbranding held an equitable defense, as a fraud on the public—  
The public interest unprotected.

In a long line of cases in which the plaintiff sought injunction for unfair competition, or passing off, the courts have had occasion to pass on the equitable defense offered, that the plaintiff was guilty himself of misrepresenting or misbranding his goods for which he sought protection of the court. The courts have characterized such misbranding as fraudulent, and have sustained the defense on the ground that "when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be, himself guilty of any false or misleading representation." (*Worden v. California Fig Syrup Co.*, 187 U. S. 516, 528.)

In the case just cited Justice Shiras quotes Chief Justice Taft, then of the Circuit Court. He says:

*Krauss v. Peebles' Sons Co.*, 58 Fed. Rep. 585, was a case in which it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies, and an injunction to prevent infringement was refused by Circuit Judge Taft, who, in his opinion, said: "To bottle such a mixture, and sell it, under the trade label and caption above referred to, is a false representation, and a fraud upon the purchasing public. A

court of equity can not protect property in a trade-mark thus fraudently used." (Italics ours.)

It is apparent that in such cases as those noted above where an equitable defense, which charges the plaintiff with misrepresentation, induces the court to dismiss the plaintiff's case, the public on which the misrepresentation and fraud is practiced by the misbranding alleged is lost sight of, and no redress is afforded it. This aptly illustrates the difference in the point of view at its inception of the proceeding authorized by the Federal Trade Commission law and a proceeding in equity. Manifestly unless there be some remedy to supplement that of the courts, the public has no standing by which it can enforce its interest against misbranding, which, it may be, is found to be practiced by both parties in an equity action. Paradoxically, the more misrepresentation the less chance of relief for the public, because although the defendant may be guilty of it, if the plaintiff be also, the latter will not be heard.

Manifestly, it is important that there should be some tribunal where the public can protect itself from the consequences of the misbranding characterized by the courts as fraudulent. Such characterization of misbranding by the courts, in a sense an adjudication of legal fraud because made the basis of the court's rejection of a cause of action, would seem to provide all that is necessary, under the decision of this court in the Gratz case, to sustain the jurisdic-

tion of this petitioner and its order, enjoining the misbranding alleged, as fraudulent, *as against the public*.

*Materne v. Horwitz*, 50 N. Y. Superior 41, 101 N. Y. 469.

*Palmer v. Harris*, 60 Pa. St. 156.

*Ginter v. Kinney Tobacco Co.*, 12 Fed. 782-783.

(b) **Fraud on the public by misbranding held to defeat recovery on contract.**

In an action on contract the plaintiff who has practiced fraud and imposition on the public by misbranding can not enforce his contract.

In *Church v. Proctor* (66 Fed. 240, C. C. A., First Circuit) it appeared that the plaintiff purchased menhaden and packed them in barrels and casks branded "Alaska," "Russian," and "California Mackerel," and "Family White Fish" (p. 245). The question of a violation of the State statute requiring the appropriate branding of pickled fish being first disposed of, the court said:

"Looking at the transactions aside from the local statute, and independently of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally" (p. 244).

"Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and the law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive and forward the sale of such articles for what they are not" (p. 245).

**V. The Federal Trade Commission indicated by the courts to supplement their powers.**

**Precedent for the order here in previous action of the Commission on the suggestion of the Circuit Court of Appeals.**

How far, in effect, the courts have gone in recognizing the public interest and protecting it under the law of unfair competition, appears from the cases, cited in point IV, above, as well as how faint a technical line divides the jurisdiction of courts of equity from the present case. Fraud on the public and injury to competitors, the substance of the whole matter, exists, in both, but the public is without redress on its initiative in the courts. A case for the application of this Commission's authority in the public interest, could hardly be more clearly indicated. That such legislation alone could supply



the hiatus in the law, which left the public powerless to act for itself to prevent general imposition on it in trade, has been pointed out by the court long before the enactment by Congress.

In the case of *American Washboard Co. v. Saginaw Manufacturing Co.* (103 Fed. 281) Justice Day, then of the circuit court, while enforcing the limitation on the power of a court of equity to give protection to the public in cases of unfair competition, suggests that the legislature must be looked to to supply the much-needed remedy when the public interest is great and an individual right of action is lacking.

In that case the bill was brought by a manufacturer who used aluminum in the washboards manufactured by him and which he branded "aluminum," charging that the defendant used the brand on washboards made by him not of aluminum but of zinc, and treating the cause of action as one for "unfair competition." The court said, Justice Day, then of the circuit court, writing the opinion:

It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, *and for which the legislature, and not the courts, must provide a remedy.*

\* \* \* \* \*

There is a widespread suspicion that many articles sold as being manufactured of wool

are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the *remedy must come from the legislature*, and not from the courts. [Italics ours.]

The Federal Trade Commission act supplies the legislation indicated by the court, which was lacking to protect the public as well as competitors against practices in which it is vitally interested, but which it was helpless to abate through the courts. This fact has been since recognized, as illustrated by the history of a case similar to the American Washboard case which arose after the passage of the act establishing the Federal Trade Commission.

In an action in the United States District Court, District of New Jersey, by the Armstrong Cork Co. et al., manufacturers of oilcloths, against the Ringwalt Linoleum Works, to enjoin the latter from using the term "linoleum" on its product, on the ground that it was composed of inferior materials not satisfying the definition of "linoleum," the court sustained a demurrer on the authority of *American Washboard Co. v. Saginaw Manufacturing Co.*, supra, Judge Rellstab in his opinion pointing out that "a

right of action of the kind here pressed lies only when a property right has been invaded." (*Armstrong Cork Co. et al. v. Ringwalt Linoleum Works*, 235 Fed. 458.)

On appeal, the Circuit Court of Appeals reversed the order, dismissing the complaint, in the following memorandum:

Per curiam.

This is an appeal from a decree dismissing the plaintiff's bill in pursuance of an opinion reported at (D. C.) 235 Fed. 485. In view of the important and far-reaching commercial questions raised in this case, we feel that they can better be approached and decided in this court after full proofs and final hearing. Following out usual course in such a situation, we express no present opinion on these questions and confine ourselves to reversing the order made below, dismissing the bill, and remand the case with directions to reinstate the bill, overruling the demurrer, without prejudice to raising the same questions on final hearing, and to proceed to final hearing. We might add that, in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission, this order is made without prejudice to the rights of the parties, while this appeal is pending, to apply for relief to that body if it so desires. [Italics ours.] (*Armstrong Cork Co. v. Ringwalt Linoleum Co.*, 240 Fed. 1022.)

In the Sears-Roebuck case, also, the Circuit Court of Appeals for the Seventh Circuit took the step neces-

sary to extend the operation of the Trade Commission act to cases where the methods used affected all competitors rather than the good will of a particular competitor. Concerning this decision, the Circuit Court of Appeals for the Second Circuit also said:

The practice there prohibited as unfair was extensive advertisements containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally. (*Federal Trade Commission v. Gratz*, 258 Fed. 314-318.)

#### **VI. The public is entitled to know what it gets.**

The public is entitled to know what it is purchasing. Any contention that the goods sold by the petitioner under labels indicating they were made of wool were really the better article although they contained cotton is beside the point. It is for the public to judge as to the merit of such articles as it wishes to buy, and in order that it may judge it is necessary that it should know what it is getting.

It is no answer to the charge of using a false and simulated brand that the article covered by the brand is of superior quality to that which the purchaser desired to buy. You may not deceive the purchaser for his own benefit. The public will not be permitted to be deceived even for their own good. A purchaser has the right to buy the particular article he desires and to be protected in the purchase. (*Pillsbury v. Pillsbury-Washburn Flour Mills*, 64 Fed. 841, 848, C. C. A., 7th Cir.)

Although the false article is as good as the true one, the privilege of deceiving the public even for their own benefit is not a legitimate subject of commerce. (*Prince Mfg. Co. v. Prince Metallic Paint Co.*, 135 N. Y. 24.)

This statement of the law was cited with approval by Justice Shiras in *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 529.

#### **Indicia of price no safeguard.**

Such indicia as prices do not cure the tendency to mislead.

It is suggested that the difference in price would excite inquiry and investigation. The advertisements in any daily paper reveal such wide and apparently unreasonable differences and reductions in prices of all character of articles that quality has largely weakened as a basis for price in the public mind. There are other reasons, unassociated with quality, which influence change in price. (*Royal Baking Powder Co. v. Emerson*, 270 Fed. 429, 441.)

#### **VII. Inveteracy of the practice only an aggravation.**

It will be argued that the practices complained against are of long standing and well understood in the trade. It will be contended also that the use of the practices is general.

Wrong does not become right by repetition. Nor can the claim of custom protect and assure the continuation of a practice once approved which an advancing sense of equity condemns. This complaint

is not an effort by the Trade Commission to regulate business from a position foreign to the conceptions which business itself entertains. On the contrary, as the report of the trade association shows, business conscious of its own needs in this regard voluntarily has condemned this practice and seeks to be freed from it. But, as in many industries, those in this particular line are subject to the opposition of elements which resist the forward looking thought and object to the regenerating process. It is against this resisting element that the functions of the Trade Commission are now directed.

To deny the right of ethical advance in business methods, upon the ground of long-established use, is to hold business in the shackles of its least enlightened and undeveloped thought and to deprive the individuals engaged therein of the right to express in their business relations their highest ideals.

The significance of the trade association's report (p. 407) is powerful. It is manifest that this industry merely needs assurance from the Commission and the courts that those who voluntarily abandon this practice will not be allowed to suffer at the hands of the few, who, either because of resentment at the approach of this governmental agency or because of a determination to cling to some advantage which the pursuit of the questioned practice brings, are unwilling to conform to the conscience of the industry.

It appears from the record that this practice of affirmatively misstating the composition of goods is not general in the trade. But even if it were, the

universality of the practice would not necessarily defend it. In many lines of industry the trade is self-conscious of unfair methods, but helpless to eradicate them because of the impossibility of obtaining uniform cooperation. In such cases the practice of the Commission is, as in this case, to call the trade into conference, seek for the trade's own expression of its business ideals, and then endeavor to sustain and protect that element which travails with a higher ethical concept by enforcing the acquiescence of those who hang back and meanwhile prey upon the rest of the trade.

The answer of this court to those who bring the argument of long use to the defense of a dilapidated wrong may well be that made by Sir George Jessel, master of the rolls, in an action involving the corruption of an agent, upon an offer to prove by the testimony of "most respectable people" that the practice was general and of long standing, namely:

You can send those respectable people home; they have come to prove an iniquitous practice and the sooner they leave the court the better. (Crew on Secret Commissions and Bribes, p. 58.)

#### **VIII. Findings conclusive if supported by evidence.**

The rule for the review of the facts by the courts is provided in the Federal Trade Commission act, section 5, as follows:

The finding of the Commission as to the facts, if supported by testimony, shall be conclusive.

This rule is repeated in the same section as applicable to new findings made, as in this case, on additional evidence taken under the provisions of the act.

**CONCLUSION.**

The judgment of the Circuit Court of Appeals, setting aside the order of the Federal Trade Commission, should be reversed.

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*Solicitor General.*

W. H. FULLER,  
*Chief Counsel, Federal Trade Commission.*

ADRIEN F. BUSICK,  
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CLERK

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1921.

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No. 333

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THE FEDERAL TRADE COMMISSION,  
*Petitioner,*  
*vs.*  
WINSTED HOSIERY COMPANY,  
*Respondent.*

---

CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF  
THE SECOND CIRCUIT.

---

BRIEF OF  
FRANK F. REED AND EDWARD S. ROGERS, AS AMICI CURIAE  
Counsel for

THE ARMSTRONG CORK COMPANY,  
GEORGE W. BLABON COMPANY,  
AMERICAN LINOLEUM MANUFACTURING COMPANY,  
NAIRN LINOLEUM COMPANY, and  
COOK'S LINOLEUM COMPANY,  
Manufacturers of Linoleum.



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CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF  
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This brief is filed on behalf of various manufacturers of linoleum whose interest in the subject matter arises as follows:

HISTORY OF LINOLEUM.

About December 19, 1863, an Englishman, Frederick Walton, invented a new floor cloth, which consisted of a composition of oxidized oil and certain gums combined with ground cork and wood flour upon a back of burlap or canvas. This composition was patented both in England and the United States and was called linoleum, which was a new word invented by Walton and first ap-

plied to his patented composition. Upon the expiration of Walton's English and American patents in 1877, the manufacture of linoleum became open to the public and by reason of the expiration of these patents and because it was the only term ever used to describe Walton's new composition, the word linoleum was dedicated to public use as descriptive of the patented floor covering (*Linoleum Manufacturing Company v. Nairn*, 7 Ch. D. 834; 47 L. J. Ch. 430; 38 L. T. (N. S.) 448). Immediately thereafter other manufacturers began to make the composition and to describe their product as linoleum. The parties on whose behalf this brief is filed are manufacturers of linoleum and represent a very large proportion of the output of this product in the United States. An extensive industry has grown up in the manufacture of this floor covering here, in Great Britain, and elsewhere. The manufacturers describe their goods as linoleum and apply this word to them by labels, stamps and in other convenient ways.

#### DEFINITION OF LINOLEUM.

The word "linoleum," both in technical and popular usage has a precise and exact meaning and is only properly used to describe a floor covering made essentially in accordance with the expired Walton patents and composed of oxidized oil and gums intimately mixed with ground cork or wood flour usually on a back of burlap or canvas, the surface being frequently finished in decorated designs which are printed upon it or result from different portions of the material being dyed in various colors and placed in suitable arrangement on the fabric back. The trade in linoleum in the United States is extensive. The product has been generally accepted by the public under the name linoleum and has been known as a reputable, durable and desirable article.



## MISUSE OF THE NAME LINOLEUM.

Beginning about 1912, long after linoleum as a floor covering had been recognized by the trade and the public as made of the materials and in the manner just stated, various manufacturers, in order to take advantage of its good reputation, placed upon the market a floor covering made of paper saturated with asphaltum, which, because its surface had fancy designs printed upon it, superficially resembled linoleum but which was not linoleum in any proper sense. This imitation was labeled and sold as "linoleum" and as "new process linoleum." It was a much cheaper product than genuine linoleum, much less durable and generally inferior. If sold at the price of genuine linoleum an excessive profit was obtained and it was possible to sell it at a price which no manufacturer of genuine linoleum, on account of the greater cost of the materials necessarily composing genuine linoleum, could possibly meet. The reputation of genuine linoleum was greatly imperiled and injured on account of the inferiority of the paper imitation. The result was not only that the market of the manufacturers of genuine linoleum was demoralized but the sale of genuine linoleum was seriously interfered with. This trade demoralization and injury were brought about and made possible by the false use of the name linoleum and its application to asphaltum saturated paper superficially contrived to resemble it.

The manufacturers of linoleum in an effort to stop this unfair competition, on January 18, 1916, filed a bill of complaint in the United States District Court for the District of New Jersey against a manufacturer of paper floor covering which he was misdescribing on his labels and in advertisements as "linoleum," to enjoin this misuse of the word. A motion to dismiss was interposed by

the defendant on the ground that there was no injury to the individual plaintiffs of which a court of equity could take cognizance. The motion was sustained by the district judge and the bill was dismissed (*Armstrong Cork Company v. Ringwalt Linoleum Works*, 235 Fed. 458.) From this decree an appeal was taken to the Circuit Court of Appeals of the Third Circuit, which, on April 14, 1917, reversed the court below in the following opinion (240 Fed. 1022) :

"This is an appeal from a decree dismissing the plaintiff's bill in pursuance of an opinion reported at 235 Fed. Rep. 458.

In view of the important and far-reaching commercial questions raised in this case, we feel that they can better be approached and decided in this court after full proofs and final hearing. Following our usual course in such a situation we express no present opinion on those questions, and confine ourselves to reversing the order made below dismissing the bill and remanding the case with directions to reinstate the bill, overrule the demurrer, without prejudice to raising the same questions on final hearing, and proceed to final hearing. We might add that in view of the possibility of bringing such matters as are here involved before the Federal Trade Commission, this order is made without prejudice to the right of the parties while this bill is pending to apply for relief to that body if it so desires."

On May 5, 1917, the mandate was filed in the District Court, and thereafter, in conformity with the opinion of the Circuit Court of Appeals, a memorandum was filed by the plaintiffs, with the Federal Trade Commission, which, after an investigation, filed its complaint against the Ringwalt Linoleum Works, and thereafter proceeded to take evidence and make a report and findings, and finally entered an order against Ringwalt Linoleum Works to cease and desist from the use of the word "linoleum" except in connection with the product which

it truthfully designates. A copy of the Commission's findings and order is printed as an appendix to this brief. A certified copy was duly filed in the District Court for the District of New Jersey in the proceeding there pending and thereafter, on July 13, 1920, a final decree, as shown in the margin, was entered by consent.

The proceeding before the Federal Trade Commission to prevent misuse of the word linoleum was brought under Section 5 of the Federal Trade Commission Act. The theory was that the sale of paper floor covering contrived in imitation of linoleum and misdescribed as linoleum was a method of competition unfair to the producers of genuine linoleum, a superior and more expensive product, because it enabled those manufacturers misdescribing paper floor coverings as linoleum to sell it at the price of genuine linoleum and thus to obtain a greater profit than would be possible if it were sold under a name truthfully indicating what it is. By this misdescription, the linoleum manufacturers were forced to compete not only with each other, which was fair com-

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"It is ordered, adjudged and decreed as follows:

That this court has jurisdiction of the subject matter of this proceeding and of the parties hereto, and that plaintiffs are entitled to the relief prayed.

It is therefore decreed that the defendant, Ringwalt Linoleum Works, its officers, agents, servants and employees, be and the same hereby each and all are, perpetually enjoined and restrained as follows:

(a) From advertising, holding out, and selling as linoleum, the floor covering manufactured by it and heretofore advertised and sold by it under the trade name of 'Ringwalt's Linoleum,' and from using the word 'Linoleum' in any way to designate or describe any similar floor covering manufactured by it which is not made essentially in accordance with the expired patents of one Frederick Walton, and which is not composed of oxidized oil and gums intimately mixed with ground cork or wood flour; and

(b) That until such time as the defendant may be engaged in the manufacture of floor covering made essentially in accordance with the expired patents of Frederick Walton and composed of oxidized oil and gums intimately mixed with ground cork or wood flour, the defendant is enjoined and restrained from using the word 'linoleum' as part of its corporate title in connection with the sale and advertisement of floor coverings manufactured by it, and

(c) That a writ of injunction issue accordingly."

petition, but with the manufacturers of the misdescribed product—on terms of apparent equality as far as the public was concerned, but actually of the most glaring inequality, because no manufacturer of linoleum could compete in price with a manufacturer of paper masquerading as linoleum. Thus the manufacturers of linoleum were forced to share a portion of the trade and market to which they had a right, with an impostor who, but for the fraudulent misdescription of his goods, could have no share in it at all. This inequality and the unfair competition thus engendered were created and continued by the false use of the word linoleum in connection with an imitation product.

As a result of the proceedings of the Federal Trade Commission, the demoralization of the linoleum industry ceased. The sale of paper floor coverings, as such, was in nowise interfered with. The misuse of the word "Linoleum" and its application to this product, however, stopped. The manufacturers of genuine linoleum were relieved of a competition with an inferior product which was made possible by misdescription of it. Competition among the linoleum manufacturers is now keen but is fair and is based on quality, price and service and is not complicated by the necessity of meeting on an apparent equality a different, inferior and misdescribed product.

The manufacturers of paper floor covering, which is a legitimate product when sold on its own merits, are competing with each other on an equality and without the necessity of misdescribing their goods to compete on equal terms with manufacturers of the same goods who by misdescription were enabled, by deceit, to obtain a higher and illegitimate profit. The public is enabled to buy what it wants under truthful names. If a

consumer wishes to buy linoleum, he is assured that what is sold him as linoleum, is linoleum. If he wants to buy paper floor covering, he is not misled by a false name into paying an excessive price for it. The result of the action of the Federal Trade Commission has been most salutary in this industry and highly beneficial to manufacturer, distributor and the public.

The manufacturers of linoleum are fearful that if the decision of the Circuit Court of Appeals in the present case should be affirmed and the view taken by that court accepted by this, the demoralization and the intolerable conditions that afflicted their industry before the Federal Trade Commission intervened, will again prevail.

#### THE PRESENT CASE.

The view of the Circuit Court of Appeals in the present case can be very briefly stated. The respondent is a maker of underwear which was manufactured, labeled, advertised and branded "Natural Merino," "Wool," "Natural Wool," "Natural Worsted" and "Australian Wool," when in fact the underwear so described was not composed wholly of wool but was composed of wool mixed with cotton. The Circuit Court of Appeals (272 Fed. 957) holds:

"In this case there was obviously no unfair method of competition as against other manufacturers of underwear. The labels were thoroughly established and understood in the trade. \* \* \* Manifestly no other manufacturer of underwear could have maintained a suit against the petitioner for unfair competition. \* \* \* Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition but is like any other misdescription or misbranding of products. \* \* \*"

## THE DEVELOPMENT OF THE LAW OF UNFAIR COMPETITION.

It is perhaps desirable, at this point, very briefly to outline the development of the modern law of unfair competition. From the crude and amateurish methods in vogue a century ago, unfair competition is now a highly specialized pursuit. To the credit of the courts be it said, that while sometimes lagging behind they have as a general thing adapted themselves to the development of parasitic ingenuity. Up to about the middle of the nineteenth century redress was only given where technical trade-marks were counterfeited or imitated. Then came the colorable imitation of labels, the appropriation of generic names, the approximation of any of the thousand elements which serve to identify one trader's goods and distinguish them from another's but in which no exclusive property right could be maintained. At first chancellors found themselves unable to cope with this because there was no property right involved in such a situation. Finally, however, common sense prevailed and the courts began to realize that these cases depended not so much upon property as upon fraud and that whatever the plaintiff's property rights might be, it is fraud to pass off the goods of one trader as and for the goods of another, however the result may be accomplished. So after years of effort the law became crystallized into a single sentence—"No one has a right to represent his goods as the goods of another."

This conclusion was reached in France earlier than in the United States or in England. The French adopted the name *concurrence déloyale* which we, in this country, have roughly translated, "unfair competition." The Germans call it *unlauter wettbewerb* and the English, the most sensible of all, call it "passing off" and desig-

nate these actions as "passing off actions," which they really are.

Thus it was, perhaps as the result of an unfortunate translation, that the term unfair competition became in danger of being restricted to cases of passing off, very largely because the bar and the courts had so universally associated the term with cases involving fraud, actual or constructive resulting in misrepresentation, express or implied, as to the commercial origin of merchandise. Unfair competition was considered a branch of trade-mark law when the exact opposite is the case. Trade-mark law is a branch of unfair competition and infringement of trade-mark is a species of the genus. In *Hanover Star Milling Company v. Metcalf*, 240 U. S. 403, Mr. Justice Pitney said (412):

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. \* \* \* This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition."

It is not a question of property but of good faith in trade.

In the language of Mr. Justice Holmes, in *Du Pont Powder Co. v. Masland*, 244 U. S. 100, 102:

"The word property as applied to trade-marks \* \* \* is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith."

Nevertheless it seemed to be assumed by some courts that unless there was a false representation that one trader's goods were the goods of another specific individual, there could be no unfair competition. It became increasingly clear, however, that unless the term

unfair competition was to be given a broader meaning than passing off, the unfair trader would still maintain his lead of the law and that unless unfair competition was held to be a broadly comprehensive term and the law still in course of development and unless it developed rapidly to include other competitive practices which shocked moral sensibilities and artificially interfered with the normal flow of trade, the law would be powerless to deal with a menace of increasing seriousness.

As law writers have been for years in the habit of grouping under such captions as "Contracts," "Injunctions," "Torts," "Actions," and the like, cases which are really cases of unfair competition and in which the judicial process has proved elastic enough to stop inequitable trade practices, so a good deal of our newer legislation is in fact directed against unfair competition, although labeled otherwise. The Food and Drugs Act is commonly assumed to be for the protection of the public health but the provisions against misbranding have nothing to do with public health. They are designed to prevent men from lying about the goods they sell and thus competing unfairly with their more scrupulous rivals. For example, there is nothing injurious to health in cane syrup, but when such a product is sold labeled "pure maple syrup" it is a deceit upon the public and subjects honest traders who honestly describe their goods, to an inequitable competition because the man who sells as "pure maple syrup" what is in fact a pure maple syrup cannot meet the prices which the falsely labeled article can profitably be sold for, and the man who sells can syrup *as such* ought not to be required to compete with the same article masquerading as a more expensive one. The provisions of modern food legislation forbidding misbranding prevent this.



The so-called Gould amendment to the Food and Drugs Act, requiring the weight, measure or numerical count to be printed on the label, secures to the purchaser his money's worth but equally protects the honest trader. He cannot compete on even terms with his rival who sells twelve ounces in what looks like a pound package. Since the net weight law he need not try.

Legislation forbidding railroad rebates is really aimed at unfair competition, because the shipper who gets a secret rebate has an inequitable advantage over the one who is not so favored.

Legislation against advertising of fire sales, bankrupt stocks, job lot sacrifices and the like are in a similar category. While of course these practices are injurious to the public, because they are usually swindles, they are also unfair to the honest trader who is trying to make a living by decent methods. He cannot meet such barbarous competition by honest means and frequently he is forced, in order to live, to adopt the same methods which he despises.

The courts have refused to define fraud because its only limit is human knavery. So with respect to unfair competition; the term ought, we think, to have the broad and general significance which it, as a part of the English language justifies, but which the courts and the profession, have perhaps unconsciously, restricted to the sale of goods with their commercial origin misrepresented.

The law is moving forward and trade morals are getting better. Not so many years ago for a business man to be reputed sharp was an asset. To say a man was shrewd or smart was to pay him a compliment. Now it is almost a slan-

der. Edward D. Page in his "Trade Morals" says that dishonesty was by no means contrary to primitive morals. As late as Defoe's time trade lies were not considered dishonest because they were expected. In our law the doctrine of *caveat emptor* has only been gradually superseded by the humanistic doctrine of implied warranties.

This court's opinion in *International News Service v. The Associated Press*, 248 U. S. 215, is an example of this enlightened advance. Mr. Justice Pitney (241) said:

"It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. \* \* \* (240): Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

# THE COURT BELOW TOOK TOO NARROW A VIEW OF UNFAIR COMPETITION.

The Circuit Court of Appeals seems to take the view that nothing short of passing off one trader's goods as and for another's is unfair competition. This may perhaps be the limit of private right, although it is accepted law that one or more producers of an article in a reputable locality may restrain one not located there from misusing the locality name.<sup>1</sup>

Untruthful use of personal names is enjoinable, that is to say where a person adopts a celebrated name, not his own, to get business.<sup>2</sup> False assertions of membership in reputable societies have been enjoined both by the society and by a member rightfully using the designation.<sup>3</sup>

Untruthful use of the name of an article made under a patent is enjoinable as unfair competition at the suit of a person whose use of the name is truthful.<sup>4</sup>

The rule has also been applied to stop the false use of the descriptive names of unpatented articles, for example, the manufacturer of an article under a name indica-

<sup>1</sup>*French Republic v. Saratoga Vichy Co.* 191 U. S. 427, 435.  
*Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608.  
*Collinsplatt v. Finlayson*, 88 Fed. 693.  
*Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. 213.  
*California Fruit Cannery Assn. v. Myer*, 104 Fed. 82.  
*Braham v. Beachim*, L. R. 7 Ch. D. 848.  
*Southorn v. Reynolds*, Vol. 12, Laws Times Reports (N. S.), 75.  
*Newman v. Alvord*, 51 N. Y. 189.

<sup>2</sup>*Vinct v. Vinct*, 14 R. P. C. 933; 15 R. P. C. 65.

<sup>3</sup>*Society of Accountants in Edinburgh v. Corporation of Accountants, Ltd.*, Scottish Session Cases, 4th Series (Rettie), Vol. 20, 750.  
*Society of Accountants and Auditors v. Goodway* (1907), 1 Ch. 489; 76 L. J. Ch. 384; 96 L. T. (N. S.), 326; 24 R. P. C. 159.  
*Carsons v. Ury*, 39 Fed. 777; 5 R. L. A. 614.

<sup>4</sup>*Jaffe v. Evans*, 70 N. Y. App. Div. 190; 75 N. Y. Supp. 257.  
*Janney v. Pancoast Ventilator & Mfg. Co.* 128 Fed. 121.  
*Singer Manufacturing Co. v. Hipple*, 100 Fed. 152.

tive of a reputable class of goods may stop a competitor from using the name on other goods not of the class—e. g., “pure wool.”<sup>5</sup>

These last cases are in conflict with ruling of the Circuit Court of Appeals of the Sixth Circuit in *American Washboard Co. v. Saginaw Manufacturing Co.* 103 Fed. 281, where it was held that the untruthful use of a descriptive name (“aluminum washboard” on zinc boards) could not be restrained at the private suit of a trader who was truthfully using the name complained of.

Judge Day said:

“It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature, and not the courts, must provide a remedy.

\*     \*     \*     \*     \*

There is a widespread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature, and not from the courts.”

The very fact that the private right is thus in doubt or is nonexistent, makes it important that there be some public authority to redress wrongs of this description.

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<sup>5</sup>*Jaeger v. LeBoutillier*, 24 N. Y. Supp. 890.

*Anheuser Busch Brewing Assn. v. Fred Miller Brewing Co.* 87 Fed. 864.

*Von Mumm v. Frash*, 56 Fed. 830.

Congress seems to have supplied the machinery for stopping such practices in enacting Section 5 of the Federal Trade Commission Act, prohibiting unfair methods of competition in commerce and providing that the Commission may enjoin their continuance.

The only condition to a private right of action at common law seems to be that the fraud must be coupled with an appreciable damage to the competitor honestly using the name in controversy. As soon as the misdescription affects injuriously a particular producer or group of producers, it would seem that under the present state of the common law as shown by the decisions just briefly referred to, the powers of a court of equity are ample to deal with the situation and that such conduct is unfair competition within accepted authority. It seems to us, therefore, that the Circuit Court of Appeals, premising as it did, its conclusion on the assumption that the misdescription of part cotton goods as wool is not unfair competition, is in error.

The situation in this case differs from the conventional case of unfair competition only in fact that the fraud is more comprehensive and its results more injurious.

In the conventional case, there is a false representation, resulting in the deceit of the ultimate consumer, that one trader's goods are something which they are not, namely, the goods of another's production, of a better reputation than the unfair trader's goods possess, to the injury of its public and of the trader whose reputation is thus appropriated. Here there is false representation, resulting in deceit of the ultimate purchaser that respondent's goods are something which they are not, namely, woolen, which have a better reputation than goods made of wool adulterated with cotton, to the injury of the public and those traders who are actually selling all-wool goods and truthfully describing them.

For an adulterated, cheaper and inferior article to masquerade under the trade description of an unadulterated, more expensive and superior article is necessarily unfair to the superior and unadulterated product and to dealers in it. There is nothing unfair or immoral in selling a mixture of wool and cotton, it is, however, unfair and immoral to label it wool. The adulteration, plus the false representation, is what is unfair, because it enables the sale of the debased as the genuine and, by this deceit, engenders an unequal competition, since the competitors do not start at the same point. The sophisticator has an unfair advantage over the trader who makes the genuine thing and truthfully describes it—who is handicapped because, necessarily his goods, being unadulterated, cost him more but he is compelled to compete in the price of them with goods which are represented to be genuine although in fact they are not. His only chance of equality is to adulterate and misdescribe in his turn and provoke further corruption in retaliation. The race thus becomes one of competitive sophistication, not of quality and service. Competition which results in this, cannot be fair, either to the participants or to the public.

#### THE LAW PROTECTS THE ULTIMATE PURCHASER FROM DECEPTION.

There is an intimation in the Circuit Court of Appeals opinion that these misdescriptions have become more or less conventionalized and are well understood among dealers and therefore they are legitimate. It is assumed that a fraud may be so many times repeated as to become innocent. Of course the consumer and the public are not on the inside and do not know that it is a mere trade convention to call part cotton underwear, "wool." A similar argument has been made in a num-

ber of cases and has been caustically repelled. For example, in *Newman v. Pinto*, 4 R. P. C. 508 (57 Law Times, New Series 31) it was asserted that it was such a commonplace for cigars made in Hamburg to masquerade as Havana and to put them out under the names of mythical Spaniards with alluring tropical scenes that no fraud could be predicated upon it.

Lord Justice Cotton observed:

“Why, to my mind, unless one knows that this is simply following an habitual practice of deception, I should understand that that represented, however much people may disregard the representation, that in fact these boxes of cigars are boxes of cigars made under this stamp, which is a Havana stamp, by a man who is connected with the Havana, although I do not much rely on that ‘Habana,’ and who is so represented as existing, and as a manufacturer that he actually, to prevent deception and imitation, signs his name on the seal label. It is said that everybody does the same, and that therefore the court ought not to interfere. In my opinion that is a contention which cannot be attended to. \* \* \*

In my opinion the mere fact that there are others, even if there are many persons who commit the same imposition on the public—or I will not say imposition, but, are guilty of the same attempt to impose on the public,—does not in any way justify the plaintiff in the course which he has taken and does not require or authorize us to interfere when we come to the conclusion that this trade is carried on by the sale of cigars in boxes which contain, although nobody may be deceived by it, a false representation as to the origin of the cigars.”

Lord Justice Bowen in concurring, remarked:

“Can it be said that that box, taken as a whole, does not represent to the mind of the person who would look at it—he would be very likely not to believe it, because I think it is quite true that persons who are accustomed to buy cigars, do not believe much what they are told on the outside of a box any more than a person who buys a horse believes

what the ostler of the horse dealer tells him—that these cigars—the manufactured article inside—are connected with Havana, to some further extent than the mere connection which arises out of the fact that they are made of the Havana leaf. \* \* \* It is true it would not take in an experienced purchaser of cigars, but is not it designed to take in somebody? Otherwise why is this elaborate concatenation of pictorial lies put upon the box? It is to take in somebody; and anybody who uses that box, knowing all the facts that I know now about it and does not explain what the box has got in it, is guilty of a fraud.”

Lord Justice Fry, in answering the assertion that the box merely represented a conventionalized misrepresentation, said:

“We are asked to say that it is immaterial, because there is no evidence that any human being has been deceived by all this concurrence of false statements; but the inquiry arises of this sort: Is this a fortuitous concurrence of lies, or is it a collocation of lies for some object and end? I can have no doubt that the answer to that inquiry must be that the lies are put together for a motive and a purpose. What is that motive and purpose? The plaintiff’s counsel have failed to suggest to us any reasonable or any honest purpose which can be served by putting all these false statements together. What is the inevitable conclusion? That the false statements are put together for the purpose of deceiving the unwary. And when we find a deliberate design to deceive, and we are asked to believe that the design has failed, and that nobody has been deceived by it, I say, speaking for myself, that the burden of proving that rests with the greatest weight on the shoulders of him who asserts that the intended deceit has failed.”

In this, as in the typical cases of unfair competition, it is the public who has to be considered, not the dealer or members of the trade who know the facts and the conditions of the business.



It is stated that the trade knows that such descriptions as merino, Australian wool and gray wool do not mean what they say, but that goods so labeled are adulterated with cotton, and it is therefore asserted that the use of the terms is unobjectionable. Of course the public does not understand that these names are false—retail purchasers do not know the trade fictions. The terms mean two things, one to the dealer, another to the consumer.

In Lord Macnaghten's phrase in *Reddaway v. Banham*, (1906) Appeal Cases, 199, 13 R. P. C. 218, 233:

"The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things."

So here, the misdescriptions complained of are only ambiguous in the sense that certain persons with peculiar facilities for information know they are false. These people of course need no protection from the law. The sharp and shrewd, the dealer and the manufacturer can take care of themselves. The public cannot—therefore we have legislation against misbranding, Section 5 of the Trade Commission Act, and other statutes of a similar nature to protect consumers from being swindled. Even in the common case of unfair trading, as Lord Hatherley said, in *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 27 L. T. (N. S.), 393, 394:

"It has been long ago pointed out in decided cases that it is not upon a *mala mens* toward the first purchaser that the decision of these cases rests. The first purchaser buys the goods cheaper for the very purpose of being able to sell them as Glenfield starch; the means of doing so being put into his hands by his being furnished with the goods with this label; I will not say in order that he may deceive, but it is a necessary consequence that he is enabled to deceive, others by this means."

Trade representations are always interpreted with reference to the public's understanding of them. In *Wor-den v. California Fig Syrup Co.* 187 U. S. 534, this court said:

"The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false."

The court quotes with approval the present Chief Justice's language in *California Fig Syrup Co. v. Stearns*, 73 Fed. 812, where he said: .

"The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

It is the knowledge of ordinary ultimate purchasers<sup>1</sup> which is considered, not that of the expert<sup>2</sup> or the careful person,<sup>3</sup> but the normal everyday man,<sup>4</sup> as some judges have designated him, the unpracticed or inat-

<sup>1</sup>*Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357, 366.

<sup>2</sup>*Godillot v. American Grocery Co.* 71 Fed. 873, 874; *Seiro v. Provencde*, L. R. 1 Ch. App. 192, 194; *Scriven v. North*, 134 Fed. 366, 379; *Liggett v. Hynes*, 20 Fed. 883, 884; *Cauffman v. Schuler*, 123 Fed. 205; *Pinto v. Badman*, 8 R. P. C. 183.

<sup>3</sup>*Williams v. Brooks*, 50 Conn. 278, P. & S. 654, 659; *Meriden Co. v. Parker*, 39 Conn. 450, 460; *Singer Co. v. Wilson*, L. R. 3, App. Cas.

376; *McCann v. Anthony*, 21 Mo. App. 83, P. & S. 1054, 1061.

<sup>4</sup>*Blackwell v. Armistead*, 3 Hughes, 163, F. C. 1474, p. 548.

tentive,<sup>5</sup> the ignorant,<sup>6</sup> or the unwary purchaser.<sup>7</sup> This last seems to be the favorite expression.

The unwary purchaser is judicially known to act in certain ways and has certain duties imposed upon him, but there are many things he need not do or know.<sup>8</sup>

<sup>5</sup>*Kinney v. Muller*, 6 N. Y. Supp. 389.

<sup>6</sup>*Bissell v. Bissell*, 121 Fed. 357, 366, "ordinary purchasers include incautious, unwary and ignorant purchasers." Cochran, D. J.

<sup>7</sup>*Battle v. Finlay*, 45 Fed. 796, 798; *Liebig's Extract of Beef Co. v. Chemists Co-op. Co.* 13 R. P. C. 635, 644 (C. A.) 13 R. P. C. 736; *Tea Co. v. Herbert*, 7 R. P. C. 183; *Celluloid Co. v. Cellonite Co.* 32 Fed. 94, 97; *Amoskeag v. Spear*, 2 Sandf. 599, 607; *Pillsbury v. Pillsbury*, 64 Fed. 841; *Wirtz v. Eagle Bottling Co.* 50 N. J. Eq. 164, 24 Atl. 658, 659; *Centaur v. Robinson*, 91 Fed. 889; *Draper v. Skerrett*, 116 Fed. 206, 209; *McLean v. Fleming*, 96 U. S. 254, 256; *Powell v. Birmingham*, 13 R. P. C. 235, 258; *Godillot v. American Grocery Co.* 71 Fed. 873, 874; *Blackwell v. Armistead*, 3 Hughes, 163, F. C. 1474; *Gorham v. White*, 14 Wall. 511; *Meriden Co. v. Parker*, 39 Conn. 450; *Potter v. Miller*, 75 Fed. 656; *Regis v. Jaynes*, 185 Mass. 458, 70 N. E. 480, 481; *Fairbank v. Bell*, 77 Fed. 869, 871; *Colman v. Crump*, 70 N. Y. 573, 578; *Somerville v. Schrembi*, 4 R. P. C. 179, 183; *Ohio Baking Co. v. National Biscuit Co.* 127 Fed. 116, 120; *Boardman v. Britannia Co.* 35 Conn. 402; *Williams v. Brooks*, 50 Conn. 278, 282, 283, P. & S. 654, 659; *Singer Co. v. Wilson*, L. R. 3 App. Cas. 376; *Steincay v. Henshaw*, 5 R. P. C. 77; *Cauffman v. Schuler*, 123 Fed. 205, 206; *McCann v. Anthony*, 3 West. Rep. 436, 21 Mo. App. 83; *Fairbank v. Luckel*, 102 Fed. 327, 332; *Von Mumm v. Frash*, 56 Fed. 830; *Swift v. Dep.* 4 Robt. 611, R. Cox, 318, 321; *Lanahan v. Kiasell*, 135 Fed. 889, 902.

<sup>8</sup>*Scriven v. North*, 134 Fed. 366, 379 (C. C. A. 4th Circuit), it was here remarked (Brawley, J.):

"It is to be remembered that a purchaser of an article of general use, which in the course of years has come to be known as of superior quality, and recognized by certain catchwords and certain visible marks, may be easily deceived into buying articles of inferior quality, designated by words of similar signification and superficially resembling the genuine; for he does not usually have the opportunity of seeing the genuine and the imitation side by side. He commonly has in mind only the characteristic features in the designation and appearance of the article he wishes to buy, and is exposed to imposition if the imitation, though slight, is of those salient features, and thus the reputation and good will established by years of advertising and production of articles of superior quality would be frittered away, if inferior goods, sufficiently resembling the genuine to be mistaken for them, are put on the market and readily sold as and for the genuine. The imitation goods may not be identical in any one feature, but, if similar in all and designated by similar marks and similar catchwords, the sale should be enjoined, or the imitation permitted only under such limitations as will prevent misapprehension on the question of its real character, and so differentiated that the public will not be imposed on or the complainant defrauded." *Stuart v. Stewart*, 91 Fed. 243, 245; *Pillsbury v. Pillsbury*, 64 Fed. 841, 847; *Western Grocer Co. v. Caffarelli Bros.* Tex. Civ. App. 108 S. W. 413, 415.

He is likely in making purchases to act on the moment.<sup>9</sup> he is not bound to study or reflect<sup>10</sup> or analyze labels or packages<sup>11</sup> or even to read or examine them.<sup>12</sup> Some courts indeed have gone so far as to hold that he has a right to be careless and the use of a mark or label will be considered unfair where deception is a probable or even a possible consequence.<sup>13</sup>

#### RESPONDENT IS LIABLE FOR PLACING AN INSTRUMENT OF FRAUD IN THE HANDS OF DEALERS.

And it is for this reason that the courts have accepted the familiar "instrument of fraud rule," that a manufacturer who by false description or false marking may not himself deceive anybody, is liable if he puts into the hands of others an instrument by which deception of the careless or unwary may result.

In the language of Mr. Justice Holmes in *New England Awl Co. v. Marlborough Awl Co.* 168 Mass. 154:

"It is found that the defendant did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It hardly can be doubted that they contemplated that the wholesale dealer at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior

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<sup>9</sup>*Paris Medicine Co. v. Hill*, 102 Fed. 148, 151.

<sup>10</sup>*Pillsbury v. Pillsbury*, 64 Fed. 841, 847.

<sup>11</sup>*Cantrell v. Butler*, 124 Fed. 290.

<sup>12</sup>*Kosterling v. Seattle Brewing Co.* 116 Fed. 620; *International Silver Co. v. Rogers*, 67 N. J. Eq. 646, 60 Atl. 187, 188.

<sup>13</sup>*Dixon v. Guggenheim*, 2 Brewst. 321, R. Cox, 559, 563; *Amoskeag v. Spear*, 2 Sandf. Sup. Ct. 509, R. Cox, 87, 95; *In re U. S. Mercantile Rep. Co.* 115 N. Y. 176, 21 N. E. 1034; *Clement v. Maddick*, 1 Giff. 98, 65 Full Reprint, 841, 842.

use, would or might try to deceive the public, and whether they did or not is immaterial."<sup>14</sup>

<sup>14</sup>In *Coca Cola Co. v. Gay Ola Co.* (C. C. A. 6th Circuit), 200 Fed. 720, Judge Denison said:

"The substantial question seems to be whether complainant has a remedy against defendant, or whether the remedy is confined to proceedings against that retail trade which is the immediate agent in deceiving the ultimate purchaser. That the defendant has planned and expected a benefit by the fraud so to be practiced, and that it has deliberately furnished to the dealers the material for practicing the fraud with the expectation and desire that the material be so used, are perfectly plain—indeed, are hardly denied.

The ultimate wrong here contemplated is clearly to be classified as unfair competition, within the definitions adopted by the Supreme Court, and by this court (*Elgin, etc. Co. v. Illinois Watch Company*, 179 U. S. 665, 674; *Merriam Co. v. Saalfeld*, 198 Fed. Rep. 369; *Everett Piano Co. v. Maus*, 200 Fed. 718), and complainant is entitled to such relief as a court of equity can give unless merit can be found in the defense that the Gay-Ola Company had the right to make and sell the article which it did sell, and that it is not responsible for the fraud of its vendees.

The interposition of equity in this class of cases rests upon the inadequacy of the remedy at law; and this inadequacy consists in the resulting multiplicity of suits, impossibility of computing indirect damages and probable irresponsibility of many wrongdoers. If these reasons lead to the issuing of an injunction against one of a large number of those who commit the final tort, even more do they indicate the necessity of an injunction against one who is conspiring or co-operating to cause a large number of such torts. Accordingly, we find it recognized by this court that in a suit for unfair competition, it is not necessary to show that the immediate purchasers were deceived as to the origin of the goods, but even if they thoroughly understand that they are buying the counterfeit and not the genuine, the manufacturer of the counterfeit will be enjoined from selling it to dealers with the purpose and expectation that it shall be used by the dealers to deceive the consumer. (*Garrett v. Garrett* (C. C. A. 6), 78 Fed. Rep. 472, 476; *Royal Co. v. Royal*, 122 Fed. Rep. 337, 345; and see cases cited in Cyc. Vol. 38, p. 778, notes 25 and 26, also *Kalem v. Harper*, 222 U. S. 55, 63.) Under the principles on which these cases were decided, we are satisfied that an injunction must go against the defendant. There is no room for it to shift the blame to 'tricky retailers,' as in *Rathbone Co. v. Champton Co.* 189 Fed. Rep. (C. C. A. 6), 26, 23; defendant is an accomplice, if not the principal, in the trick."

The authorities are unanimous that the manufacturers are liable for the placing in the hands of retailers the means by which they may commit a fraud. *Hostetter v. Bruggeman-Reinert Distilling Co.* 46 Fed. 188; *Hostetter v. Van Vorst*, 62 Fed. 000; *Hostetter v. Becker*, 73 Fed. 297; *Hostetter v. Sommers*, 84 Fed. 333; *Hostetter v. Brunn*, 107 Fed. 707; *Hostetter v. Conron*, 111 Fed. 737; *Samuels Bros. v. Hostetter*, 118 Fed. 257; *Cahn v. Gottschalk*, 2 N. Y. Supp. 13, 17; *For v. Glynn*, 191 Mass. 344, 78 N. E. 89; *Van Houten v. Hooten*, 130 Fed. 600, 604; *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 345; *Scriven v. North*, 134 Fed. 366, 374; *Lever v. Goodwin*, L. R. 36 Ch. Div. 1, 4 R. P. C. 492; *Globe-Wernicke Co. v. Brown*, 121 Fed. 90, 92; *N. K. Fairbank Co. v. Luckel*, 102 Fed. 327; *N. K. Fairbank Co. v. Bell*, 77 Fed. 800, 879; *Enoch Morgans Sons v. Whittier-Coburn Co.* 118 Fed. 657, 661; *Read v. Richardson*, 45 L. T. (N. S.), 54; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Singer Co. v. Loog*, L. R. 18 Ch. Div. 395, 412; *Little v. Kellam*, 100 Fed. 353, 354; *Morie Co. v. Daoust*, 206 Fed. 434.

## CONCLUSION.

It seems, therefore, even under accepted principles as developed in the common cases of unfair trading, using the phrase in its most limited sense, as if the Circuit Court of Appeals took too narrow a view of this case. It seems to us that the court should have held that the conduct complained of by the Commission is an unfair method of competition against those manufacturers of underwear who honestly describe and sell their goods for what they are; that if any manufacturer who so honestly described his goods could show special damage he might have maintained a private suit against the respondent to restrain the misdescription, and that, in any event, a public action like the present is appropriate, that respondent is liable when it stamps a misdescription upon its goods, even though the immediate vendee may not be deceived, if the result is deception of the ultimate purchaser, because by so doing respondent places an instrument of fraud in the hands of another. The fact that misrepresentation and misdescription have become so common in the underwear trade, that dealers do not accept labels at their face value, is no reason for holding them to be legitimate trade practice, when the public who purchases underwear, labeled "natural wool," knows nothing about the cheat and is not informed that what it is getting, is an admixture of cotton, the extent of the adulteration being limited only by the avarice of the seller. If, as held by the Circuit Court of Appeals, in the very comprehensiveness of his fraud an unfair trader secures exemption from private suit because there is no proper plaintiff specially damaged, and if the statutory prohibitions against unfair methods of competition are so interpreted as not to prevent such practices, then the sort

of unfair trading which this record discloses is beyond the reach of the law, its perpetrators immune, and its victims without remedy.

Respectfully submitted,

FRANK F. REED,

EDWARD S. ROGERS.

*Counsel for*

The Armstrong Cork Company,

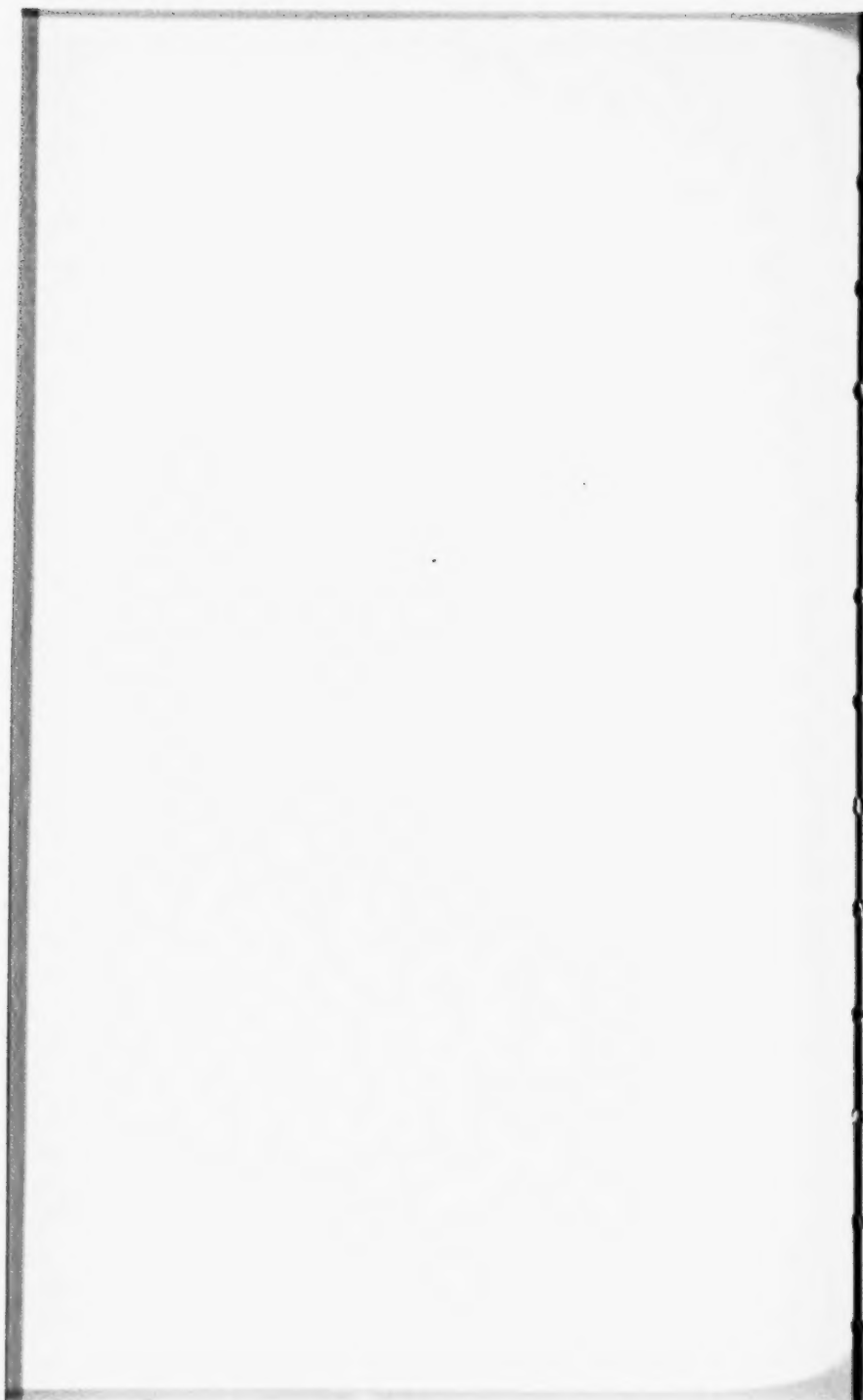
George W. Blabon Company,

American Linoleum Manufacturing  
Company,

Nairn Linoleum Company,

Cook's Linoleum Company,

Manufacturers of Linoleum.





## APPENDIX.

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UNITED STATES OF AMERICA.

Before Federal Trade Commission: ss.

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At a Regular Session of the Federal Trade Commission, Held at Its Office in the City of Washington, D. C., on the 27th Day of May, A. D. 1919.

Present:

William B. Colver, Chairman.

John Franklin Fort,

Victor Murdock,

Huston Thompson,

*Commissioners.*

Federal Trade Commission,  
vs. } Docket No. 96.  
Ringwalt Linoleum Works, Inc. }

## REPORT AND FINDINGS.

The Federal Trade Commission, having issued and served its complaint herein, wherein it is alleged that it had reason to believe that the above-named respondent, Ringwalt Linoleum Works, Inc., had been and then was using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in that respect would be to the interest of the public, and fully stating its charges in that respect; and the respondent having entered its appearance by its attorneys at law, Kenyon & Kenyon, and formal hearing having been held before an Examiner

of this Commission, testimony being introduced on behalf of the Commission, and the respondent declining to introduce any testimony in its defense, and the Commission being duly advised in the premises, now upon the pleadings and said testimony, the Commission makes its report and findings as to the facts and conclusions.

#### FINDINGS AS TO THE FACTS.

*Paragraph One.* That the respondent, Ringwalt Linoleum Works, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal factory, office and place of business located at the City of New Brunswick in said state, now and for more than two years last past engaged in the manufacture and sale of a floor covering composed of a felt paper base impregnated with asphaltum with a paint backing and facing, among the several states of the United States, the territories thereof and the District of Columbia, in direct competition with other persons, firms, copartnerships, and corporations similarly engaged.

*Paragraph Two.* That the respondent, Ringwalt Linoleum Works, Inc., in the conduct of its business, manufactures such floor coverings so sold by it, in its factory located at the City of New Brunswick, State of New Jersey, and purchases and enters into contracts of purchase for the necessary component materials needed therefor, in different states and territories of the United States, causing the same to be transported to its factory where they are made into the finished product; sold and shipped to the purchasers thereof; that after such products are so manufactured, they are continuously moved to, from and among other states and territories of the United States, the District of Columbia and foreign countries, and there is continuously and has been at all times here-

inafter mentioned, a constant current of trade and commerce in the said products between and among the various states and territories of the United States, and the District of Columbia, and especially to and through the City of New Brunswick, State of New Jersey, and therefrom to and through other states and territories of the United States and the District of Columbia.

*Paragraph Three.* That the word "linoleum," both in technical and popular usage has a precise and exact meaning and is only properly used to describe a floor covering made essentially in accordance with the expired patents granted to one Frederick Walton in England on December 19, 1863, No. 3210, and in the United States on February 23, 1869, No. 87,227, and composed of oxidized oil and gums intimately mixed with ground cork or wood flour, usually on a back of burlap or canvas, the surface thereof being frequently finished in decorative designs which are either printed thereon or result from different portions of the material being dyed in various colors and placed in suitable arrangement upon the fabric back.

*Paragraph Four.* That the respondent, under its corporate name, Ringwalt Linoleum Works, Inc., is engaged in the manufacture and sale of a floor covering under the name "Ringwalt's Linoleum" which is not made at all in accordance with the expired patents of Frederick Walton, and is not composed of oxidized oil and gums intimately mixed with ground cork or wood flour on a back of burlap or canvas, but consists of a base of felt paper saturated with asphaltum and painted on both sides with one or more coats of paint and printed on the top surface with decorative designs similar to those with which linoleum is printed, and that the respondent manufactures no linoleum as hereinbefore described in Paragraph Three of these findings.

*Paragraph Five.* That there are numerous other felt paper base floor coverings made by different manufacturers essentially similar to the product of the respondent, described in Paragraph Four of these findings, and extensively sold and advertised in interstate commerce throughout the various states and territories of the United States, under various trade names, and that none of said felt paper base floor coverings is advertised or held out by its manufacturer as linoleum.

*Paragraph Six.* That in appearance the said product of the respondent closely resembles the printed linoleum hereinbefore described in Paragraph Three of these findings, and the respondent for more than two years last past, with the effect of stifling and suppressing competition in interstate commerce in the sale of floor coverings, has held out, advertised and sold its product as linoleum, which simulation is designed and calculated to, and does, deceive and mislead the public and cause purchasers to believe that the said product of respondent is linoleum.

#### CONCLUSIONS.

That the methods of competition set forth in the foregoing findings as to the facts is, under the circumstances set forth in the above findings as to the facts, an unfair method of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

(Signed) WILLIAM B. COLVER,  
*Chairman.*

HUSTON THOMPSON,  
VICTOR MURDOCK,  
*Commissioners.*

(SEAL)

Dated this 27th day of May, A. D. 1919.

## UNITED STATES OF AMERICA.

Before Federal Trade Commission: ss.

At a Regular Session of the Federal Trade Commission, Held at Its Office in the City of Washington,  
D. C., on the 27th Day of May, A. D. 1919.

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Federal Trade Commission, }  
                                  *vs.* } Docket No. 96.  
Ringwalt Linoleum Works, Inc. }

## ORDER TO CEASE AND DESIST.

The Federal Trade Commission, having issued and served its complaint herein, wherein it is alleged that it had reason to believe that the above-named respondent, Ringwalt Linoleum Works, Inc., had been and then was using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and that a proceeding by it in that respect would be to the interest of the public, and fully stating its charges in that respect; and the respondent having entered its appearance by its attorneys at law, Kenyon & Kenyon, and formal hearing having been held before an Examiner of this Commission, testimony being introduced on behalf of the Commission, and the respondent declining to introduce any testimony in its defense; and the Com-

mission having made its report and findings as to the facts and conclusions upon the pleadings and said testimony and having concluded upon such findings as to the facts that the respondent has been guilty of an unfair method of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," which report is hereby referred to and made a part hereof.

NOW, THEREFORE IT IS ORDERED, that the respondent, Ringwalt Linoleum Works, Inc., cease and desist from advertising, holding out, and selling as linoleum the floor covering manufactured by it and heretofore advertised and sold by it under the trade name of "Ringwalt's Linoleum," and from using the word "linoleum" in any way to designate or describe any similar floor covering manufactured by it which is not made essentially in accordance with the expired patents of one Frederick Walton, and which is not composed of oxidized oil and gums intimately mixed with ground cork or wood flour; and it is

FURTHER ORDERED, that until such time as the respondent may be engaged in the manufacture of floor covering made essentially in accordance with the expired patents of Frederick Walton and composed of oxidized oil and gums intimately mixed with ground cork or wood flour, the respondent shall cease and desist from using the word "linoleum" as part of its corporate title in connection with the sale and advertisement of floor coverings manufactured by it.

By order of the Commission.

(Signed) J. P. YODER,

(SEAL)

*Secretary.*

(Signed) EDWARD L. SMITH,

*Acting Chief Counsel for the Commission.*

Office Supreme Court, U. S.

**FILED**

**JAN 9 1922**

**WM. H. STANSBURY**

**CLERK**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1921.

**No. 333**

**FEDERAL TRADE COMMISSION,**

*Petitioner,*

*against*

**WINSTED HOSIERY COMPANY,**

*Respondent.*

ON CERTIORARI FROM THE SECOND CIRCUIT.

**BRIEF OF MORTEN Q. MACDONALD AND  
WALTER GORDON MERRITT, AS  
AMICI CURIAE.**

**MORTEN Q. MACDONALD,**

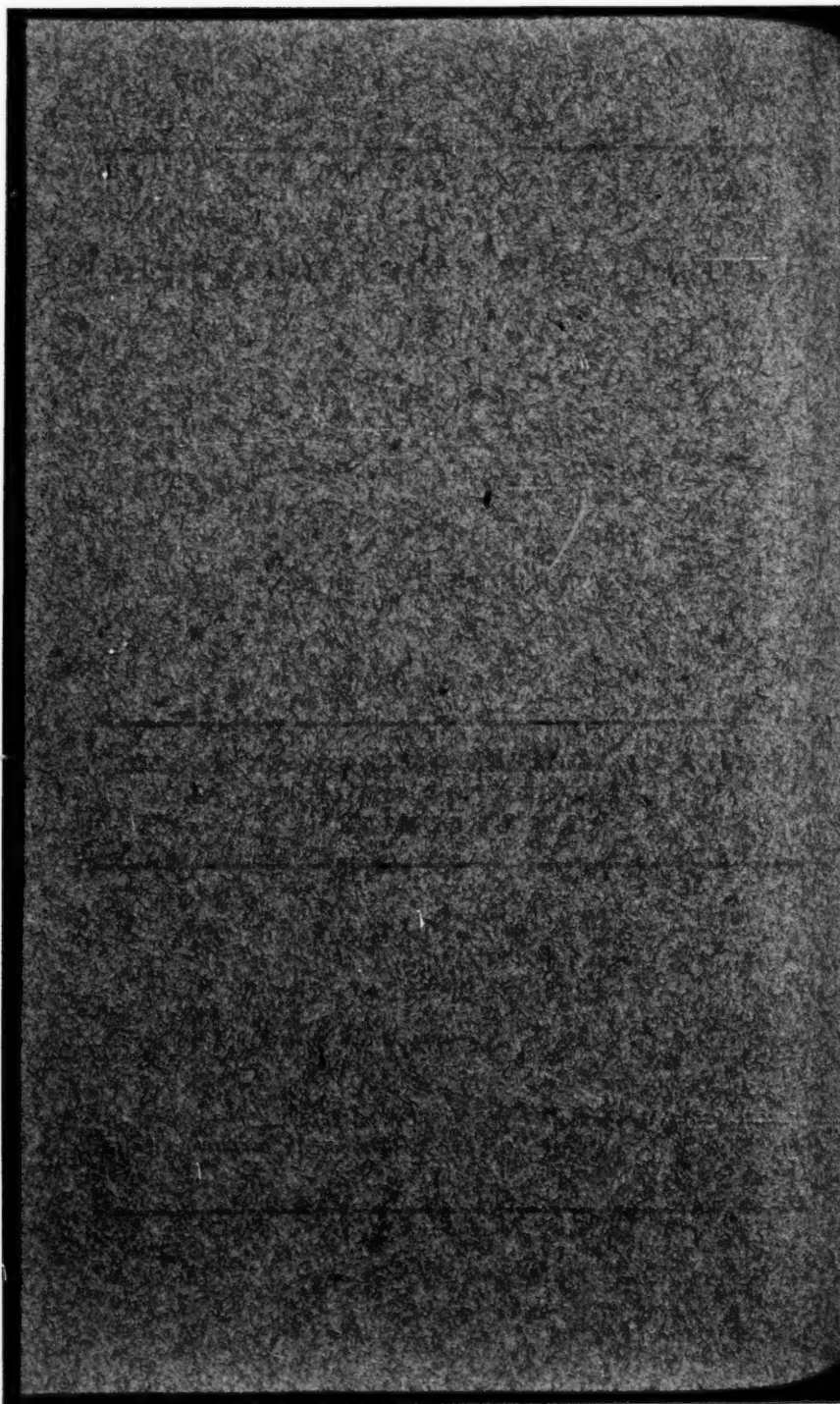
Solicitor for

Paint Manufacturers Association of the  
United States  
National Varnish Manufacturers Association.

**WALTER GORDON MERRITT,**

Solicitor for The Silk Association of America.







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**BRIEF OF MORTEN Q. MACDONALD  
AND WALTER GORDON MER-  
RITT, AS AMICI CURIAE.**

The Silk Association of America, the Paint Manufacturers Association of the United States and the National Varnish Manufacturers Association have actively co-operated with the Federal Trade Commission in the elimination of misbranding in their respective trades and, being fearful that some of the expressions of the Circuit Court of Appeals in this case would, if affirmed by this Court, seriously affect the good work so far accom-

plished, requested their respective counsel to apply for leave to file this brief.

In this case the Federal Trade Commission filed its complaint against the respondent herein, requiring it to show cause why it should not desist from labeling underwear of its manufacture, composed of cotton and wool, as "Merino," "wool" or "worsted."

Under date of January 29, 1920, the Commission made an order directing the respondent to desist from directly or indirectly employing or using said labels, or any similar descriptive brands or labels on underwear, socks or other knit goods composed partly of wool, except (1) when the knit fabric is made entirely of wool yarns of a kind specified, or (2) when the term describing the wool stock is joined with the name of other staple or staples contained in the fabric.

The matter was then brought before the Circuit Court of Appeals for review by the Winsted Hosiery Company, and thereafter an application was made to that Court for permission to take additional evidence, and on October 18, 1920, the Court made an order granting the application. The new hearings commenced on November 15, 1920 (Record, p. 52), and at the first hearing the respondent made an offer to accept the order of the Commission dated January 29, 1920, except in so far as the use of the word "Merino" was directed to be abandoned.

At the close of the hearings and under date of January 14, 1921, the Commission made its report, with new and modified findings and recommended modification of the first order. By the new order the respondent was directed to desist from using as labels on goods not composed wholly of wool, or

on the wrappers, boxes, or other containers, the word "Merino," "wool" or "worsted," unless accompanied by a word or words designating the substance, fibre or material other than wool of which the garments are composed in part, or by word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (Record, p. 52).

The findings of fact contained in the report of the Commission, so far as pertinent to this brief, may be summarized as follows:

For more than ten years prior to the date of the issuance of the complaint herein, respondent sold and shipped its products to purchasers thereof located throughout the United States and there has been a constant trade and commerce in such product between and among various States of the United States. For three years prior to October, 31, 1918, the respondent's sales of its product aggregated \$2,500,000 (par. 2). Respondent admitted by its answer that it has, in the conduct of its business, manufactured and sold in commerce and labeled, advertised and branded certain lines of underwear as "Men's Natural Merino Shirts," "Men's Gray Wool Shirts," "Men's Natural Worsted Shirts," "Australian Wool Shirts," and "Men's Natural Wool Shirts," and that such underwear is not composed wholly of wool.

The methods employed by the respondent in labeling, advertising and branding its product are effective to carry both to the retailer and the ultimate consumer thereof the representation that the garment is composed wholly of wool (par. 4).

The underwear so labeled, advertised and sold is not composed wholly of wool, being part wool and part cotton, the percentage of wool varying

generally from 25 per cent. to 80 per cent. and in some cases being as low as 10 per cent. (par. 6).

The labels used by respondent tend to encourage and aid representations to consumers by ignorant or unscrupulous retailers and salesmen that the underwear so labeled is all wool and *are calculated to and do mislead a substantial portion of the purchasing public* to believe that the garments sold under such labels are all wool (par. 16).

Knit underwear made wholly of wool has been widely manufactured and sold in this country for twenty years or more under various labels, such as "all wool," "wool," "natural wool," and "pure wool," and under trade mark brands without any words descriptive of the composition thereof. Such underwear has constituted a substantial proportion of the total product of all wool, and wool and cotton underwear, and all wool knit underwear has been imported for sale into this country by various retail dealers for twenty years or more and has been sold under similar labels (pars. 21 and 22).

Knit underwear composed partly of cotton and partly of wool, under the labels "natural Merino," "natural wool," "gray wool," "natural worsted," *has been sold by respondent in competition with underwear manufactured wholly of wool, imported and domestic, and manufactured and sold under labels indicating that fact, or under some of the other labels above named, and in competition with knit underwear composed partly of cotton and partly of wool, imported or domestic, manufactured and sold under labels indicating such composition or under trade marks or brands alone, without descriptive terms or under labels bearing fancy or coined names* (par. 24).

The conclusion of the Commission is (Record, p. 51) that the practices of the respondent under the conditions and circumstances described in the findings are unfair methods of competition in interstate commerce and constitute a violation of the Federal Trade Act.

By Section 5 of the Act the findings of the Commission as to the facts, if supported by testimony, shall be conclusive, but the order of the Commission may be reviewed by the Circuit Court of Appeals, which is given jurisdiction to affirm, set aside, or modify the order of the Commission.

This Court said in *Federal Trade Commission v. Gratz*, 253 U. S., 421, 427:

"The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include."

But, as we read this decision, it does not conflict with that part of the statute which provides that the *findings of fact* of the Commission, if supported by testimony, shall be conclusive. The Circuit Court of Appeals in this case did not question or disturb the findings of fact made by the Commission, but disagreed with the conclusion of the Commission that the practices of the respondent constituted a violation of the Act.

It would seem clear that the words "unfair methods of competition" cover all methods which tend to thwart or obstruct the process of fair and open competition, whether those methods be boycotts, coercion, other combinations in restraint of trade, or deception. The purchaser's right of free

selection is one of the essentials of fair economic competition, and that right is as much destroyed or defeated by fraud as to the origin or nature of the goods, as it is by artificial restraints and intimidation. It is not only natural but inevitable that the phrase "unfair competition," which originated in fraudulent competition, should have been extended under modern conditions to many other practices, but it cannot be successfully contended that such a comprehensive phrase, which originated in cases of fraud and has subsequently been extended, shall be wrested from its original meaning and shall no longer have application to misbranding in the course of interstate competition.

Unfair methods of competition are those which conflict with fair methods.

"Fair competition in an economic sense signifies a competition in economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. \* \* \* Artificial restrictions are clearly unfair since they hinder or prevent such organizations from competing to the extent which their productive and selling efficiency may warrant. If there be a sound basis for competition, it lies in the preservation of the economically efficient and the destruction of the inefficient. \* \* \* The definition of unfair competition, therefore, should be general in terms. Any act or method of competition which hampers, injures or destroys persons which could compete on the basis of their productive and selling efficiency, should be forbidden as much as any method except productive and selling efficiency which pre-



vents potential competition from becoming actual competition."

*Political Science Quarterly*, June and Sept., 1914; William S. Stevens on Unfair Competition.

The Federal Trade Commission Act was designed to protect fair competition from unfair methods of competition, and declares a ban on all unfair methods of competition, regardless of their nature. When Congress used the phrase "unfair methods of competition," it established the yardstick by which the conduct of parties was to be tested in the future, and included all unfair methods of competition without qualification. The rule of construction should be that applied in *Loewe v. Lawlor*, 208 U. S., 274, when interpreting the original anti-trust law.

Possibly the Circuit Court of Appeals does not disagree with this fundamental proposition, but rather stands on the proposition that the particular case of misbranding presented herein does not come up to certain other tests which it expressly applies in its opinion.

The Court said (272 Fed. Rep., p. 960) :

"Assuming that some consumers are misled because they do not understand the trade signification of the labels, or because some retailers *deliberately* deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of products. Conscientious manufacturers may prefer not to use a label which is *capable* of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but

it is in our opinion not within the province of the Federal Trade Commission to do so."

The Court seemed to forget that it was dealing with a label which was literally false. It was not necessary that dealers "deliberately" deceive consumers. The deception was automatic. These labels "are calculated to and do mislead a substantial portion of the purchasing public." That is the finding. If the respondent relied on a secondary meaning, so thoroughly established that the description no longer deceived, it failed to make good on the secondary meaning so long as a substantial part of the public is deceived. We are not dealing with markings which are capable of misleading, but markings which automatically do deceive.

The Court continues:

"The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public. \* \* \* In this case there was obviously no unfair method of competition *as against other manufacturers of underwear*. The labels were thoroughly established and understood *in the trade*. There was no passing off of the petitioner's goods for those of another manufacturer. There was no combination in restraint of trade nor any attempt to establish a monopoly."

The conclusion of the Circuit Court of Appeals is that a manufacturer distributing misbranded goods in interstate commerce, in competition with manufacturers who distribute honestly branded

goods, is not engaged in an unfair method of competition, even though the public is injured and deceived thereby, unless it also appears (1) that the competing manufacturers are specially injured (2) through the deception of the dealers who are the immediate customers of the manufacturers. This ruling is in spite of the fact that in a private suit, where special injury is the gravamen, as against a public proceeding like this, where special injury is immaterial, no actual proof of deception need be given (*Notaseme Hosiery Co. v. Straus*, 240 U. S., 179). It is difficult to grasp the exact point of the Circuit Court of Appeals, but since it seems to be undenied that misbranding is an unfair method of competition in appropriate cases, the question of these two stated requirements seems to sum up the points at issue. We contend that such requirements would deprive the public of the protection which the statute was designed to give and are not only in conflict with other decisions bearing on the subject but with other utterances of the same Court.

The requirements that there should be an express showing that the unfair method of competition was practised against other manufacturers seems entirely out of place in a public suit, brought under a statute which makes the interest of the public the supreme test. The Trade Commission Act is designed to protect the public and not to correct private grievances and it deals with cases where a private litigant could not proceed because he is not specially injured (*Armstrong Cork Co. v. Ringwalt*, 235 Fed., 458, 240 Fed., 1022; *N. Y. & Rosendale Cement Co. v. Coplay*, 44 Fed., 277; *Oxford v. Wilmore-Andrews*, 101 Fed., 443; *Nims on Unfair Competition*, Sec. 8), so that injuries to com-

petitors are immaterial. The fact clearly appears that here is an unfair method which one manufacturer is utilizing in competition with manufacturers who employ fair methods, with the result that the unfair method is capturing trade through the fraud that it consummates. This would seem to satisfy the most exacting requirements for the purpose of a public proceeding.

In *Federal Trade Commission v. Gratz*, 258 Fed., 314, the Second Circuit held that the Act gave no authority to any individual to present his grievances, and that the Commission is to interpose only *in the interest of the public*. Special injury to a manufacturer or dealer is not the test, but injury to the public, which is the consumer.

That decision was affirmed by this Court in 253 U. S., 421. In referring to the complaint in the case, this Court said (p. 428) :

"Nothing is alleged which would justify the conclusion that *the public suffered injury*, or that competitors had reasonable ground for complaint."

In *New Jersey Asbestos Co. v. Federal Trade Commission*, 264 Fed., 509, the Circuit Court of Appeals, Second Circuit, said (p. 510) :

"We have held in *Federal Trade Commission v. Gratz*, 258 Fed. Rep. 314, that only *unfair practices which affect the public*, as distinguished from individuals, are within the jurisdiction of the commission."

In *Becch-Nut Packing Co. v. Federal Trade Commission*, 264 Fed., 885, the same Court said (p. 889) :

"The subject is one *affecting the public generally*, and plainly within the jurisdiction of the commission."

In a concurring opinion Judge Manton said (p. 890):

"This act forbids all unfair methods of competition. It does not define what is unfair competition, but leaves that to the commission for determination. Section 5 provides that the commission is empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the acts to regulate commerce, by using methods of unfair competition in commerce. It will thus be observed that there is no restriction or qualification to the powers thus conferred, *but the method of commerce must be unfair.*"

In *Scars, Roebuck & Co. v. Federal Trade Commission*, 258 Fed., 307, the Court said (pp. 310-311):

"Petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words 'unfair methods of competition' be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. \* \* \* On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. *The commissioners, representing the government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been*

denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control."

If the *methods* are unfair, and the interests of the public are affected, it matters not that there was no unfair method practised against a particular manufacturer, or that what was unfair as towards the public was thoroughly established and understood in the trade, or that there was no passing off of another's goods, or that there was no combination in restraint of trade or attempt to create a monopoly. Misbranding is assuredly an unfair method of competition as to competitors who truthfully brand the same article.

We come now to the most alarming principle suggested by the decision below, to the effect that unfair methods as against competitors must appear by a showing that the immediate customers of the manufacturers were deceived. This leads to the extraordinary conclusion that the use of a false brand by a producer, which actually succeeds in deceiving the ultimate consumer, does not present an unfair method of competition within the meaning of the statute, unless it be also shown that the dealer or middleman who purchased of the manufacturer was likewise deceived. If the manufacturer who is guilty of the wrongdoing can show that he confided his secret to the dealer, he cannot be held accountable. If it appear that the dealer knew the fraudulent character of the tool with which he was playing, so that he could the better

carry out the original purpose of deceiving the consumer, the public shall be left defenseless. The test of legality shall be, not the deception of the unsophisticated consumer, but the rare case of deception of the sophisticated dealer. The statute shall thus be twisted into one primarily for the protection of dealers and manufacturers rather than one for the protection of the public, and this notwithstanding the fact that the statute expressly emphasizes the public interest. In cases of false markings the dealer who is in direct contact with the manufacturer, and who is trained to distinguish the niceties of quality and character, is not likely to be misled. He is an expert and seldom ignorant of the true origin and nature of the goods he purchases. If the protection of the public against false names were dependent on the manufacturer's ability to hoodwink a dealer having esoteric knowledge, the business of palming off and pirating trade will greatly increase.

Neither is there any force in the claim that such unfair methods are not unfair methods of *competition* as against other manufacturers unless it appear that immediate customers are deceived. This theory entirely ignores the fact that manufacturers of articles in common use produce them to sell to the consuming public and merely make use of the wholesalers and retailers as necessary channels of distribution, and not infrequently place goods with them on consignment, or as their agents. *The competition between the manufacturers is present until the consumers' wants are supplied.* National advertising by manufacturers is a recognition of this obvious fact. Unless the retailers' knowledge of the material of which the garments are composed is passed on to the purchaser, it is

of no more importance in the case at bar than the knowledge of the mill hands who produce the goods.

In this case it is expressly found that the misbranded products compete in interstate trade with truthfully marked goods which are partly wool, and truthfully marked goods which are wholly wool. If the misbranded goods attract customers by virtue of the fraud which they perpetrate, as is the fact in this case, then surely the producer of truthfully marked goods is presumably injured by an unfair method of competition. The wrongdoer is pirating trade in an equally effective way, whether he deceives the dealer who is his direct customer, or whether he puts on the market an unlawful instrument whereby the dealer will sell more goods to the consumer and buy more goods of the producer. The amount of honest trade wrongfully misappropriated by dishonest methods and the amount of injury to the honest manufacturer may be the same in either event. This is the law as laid down in unfair competition cases, and seems to be clearly applicable to the case in question. The statute dispenses with the need of showing an exclusive interest and special injury, but does not seem otherwise to change the well established rules as to unfair competition cases, in connection with the particular matter we are discussing.

Turning to the authorities, we submit the case is analogous to, but stronger than, a case where a competitor supplies a third party with the means of infringing a patent or trade mark, and is on that account held to be a contributing infringer. In this case the respondent knowingly placed on the market certain goods which in the ordinary course of business deceive the public without further representation on the part of anyone. The



true principle to be applied to such a situation is set forth in numerous cases.

The principle is that one who furnishes another with the means of consummating a fraud is himself a wrongdoer.

*Hostetter Co. v. Brueggeman*, 46 Fed., 188.

The manufacturer places in the hands of the dealers the implements which enable them to deceive the general public. He enables others to do it, and he suggests the way in which it can be done successfully.

*Hostetter Co. v. Becker*, 73 Fed., 297, 298.

One who puts into the hands of retail dealers an article made by him, and which such dealers can use for the purpose of deceiving the ultimate purchaser, is equally guilty with the dealer.

*Von Mumm v. Frash*, 56 Fed., 830.

Such conduct is clearly within the prohibitions of law against fraud and unfair trade, whether by direct means or through the indirect, but no less reprehensible, methods of contributory infringement.

*Von Mumm v. Witteman*, 85 Fed., 966.

*Hennessy v. Herrman*, 89 Fed., 669, 670.

In *The Le Page Co. v. Russia Cement Co.*, 51 Fed., 941, the Court said (p. 944) :

“The case at bar will be found to turn on the facts that the label or mark used in this case, so far from being inapt to deceive subsequent purchasers, necessarily tended, un-

der the circumstances, to mislead the public, including subsequent purchasers, and also that persons of ordinary intelligence, honestly considering the natural results, must have foreseen that they would so mislead."

The rule has been frequently applied in cases where unfair competition has been the basis of complaint.

In *Nims on Unfair Competition and Trade Marks* it is said (p. 664) :

"It is well settled that a manufacturer who puts in the hands of the immediate purchaser the means of deceiving the ultimate purchaser is chargeable with unfair competition. The possibility that the retailer may not be honest in such matters must be taken into account by the manufacturer. The courts would be without power to give aid in a large number of these cases were their right to grant relief limited to the cases where the immediate customer is deceived. Whether 'the trade'—the jobbers and retailers—are deceived is not the question. English decisions are most emphatic on this point."

In *Steinway v. Henshaw*, 5 R. P. C., 79 (1889), the Court said :

"It is not a question whether it is calculated to deceive the trade at all. The court does not protect the trade, who are well acquainted, or supposed to be well acquainted, with the various forms of instruments, but the public \* \* \*."

In the case of *Foster Mfg. Co. v. Cutter Power Co.*, 211 Mass., 219, 222, the Court said:

"It is wholly immaterial, where this right has been invaded, that the retail and wholesale dealer who may be the immediate purchaser of the goods put out in imitation, is not misled as to their identity. The wrong of unfair competition is present where goods are so dressed in form, or marked by decorative symbols, that the ultimate consumer, when the goods are distributed for use in the ordinary course of trade, either is, or possibly may be, deceived. The liability to deception being the test, it also is not necessary to show that specific buyers have been actually deceived or that the infringer intended to deceive the public."

In *Materne v. Horwitz*, 101 N. Y., 469, the plaintiffs were denied relief in an action on a contract for the sale of Maine sardines to be packed with "fancy labels," *i. e.*, decorated labels in a French style. The labels bore names, apparently of French packers, doing business in France, although it did not appear that there were any persons of that name. In denying relief, Miller, *J.*, observed:

"It is also evident that the labels were used to *deceive the consumers and not the contractors* and to obtain higher prices for the sardines" (p. 471).

In the same case, below (50 N. Y. Superior, 18 J. & S., 41), Chief Justice Sedgwick observed (p. 44):

"It must be kept in mind that on the facts of the particular case, the effect of the evidence is, that although *wholesale dealers might not or probably would not be deceived*

by the labels as to the contents of the boxes, it must be inferred that the labels were used for some purpose, either as to dealers or consumers, and that purpose must have regarded consumers, *as the dealers would not be deceived*. The dealers would knowingly sell to the consumers who would be without knowledge. In fact the trade appears to be a large one in which these deceptive labels alone are used."

In the case of *Southern White Lead v. Cary et al.*, 25 Fed., 125 (C. C., 1885), the Court said (p. 126) :

"The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to consumers who are or may be deceived. The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of the complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud, *or is likely to be injured by it.* \* \* \*"

In *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed., 869, the Court said (p. 875) :

"Defendant is a manufacturer, and sells only to the trade. By its salesmen it offers its soap powder in competition with complainant's, as an article equal or superior thereto, and at a less price. Undoubtedly, no one who bought from defendant was ever deceived. No effort was ever made to delude the trade into the belief that defendant's salesmen were selling complainant's goods. But equity regards the consumer as well as the middleman. It is to him, more than to

the jobber or wholesale purchaser, that the various indicia of origin with which merchants dress up their goods appeal; and courts will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package."

In *National Biscuit Co. v. Baker*, 95 Fed., 135, the Court said:

"As has been often pointed out before, it makes no difference that dealers in the article are not deceived. No one expects that they will be. It is the probable experience of the consumer that the court considers."

In *Gulden v. Chance*, 182 Fed., 303, the Court said (p. 318):

"The fact that salesmen or middlemen are in a position to distinguish the olives packed by the defendants from those packed by the complainant by reason of differences in bottles or labels is unimportant. The material point here is the liability of ordinary consuming purchasers to be confused and misled on the subject."

In *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed., 720, the Court said (p. 722):

"The substantial question seems to be whether complainant has a remedy against defendant, or whether the remedy is confined to proceedings against that retail trade which is the immediate agent in deceiving the ultimate purchaser. That the defendant has planned and expected a benefit by the fraud so to be practiced, and that it has deliberately furnished to the dealers the material for practicing the fraud, with the

expectation and desire that the material be so used, are perfectly plain—indeed, are hardly denied. The ultimate wrong here contemplated is clearly to be classified as unfair competition, within the definitions adopted by the Supreme Court and by this court. \* \* \*

In *Shredded Wheat Co. v. Humphrey Cornell Co.*, 244 Fed., 508, the Court said (p. 522) :

"The vital question here—as in all cases of like kind—is not whether dealers are liable to be deceived in buying from the manufacturer or wholesaler, but whether the user is liable to be misled in buying from the retailer."

With such authorities before us in private cases where direct and special injury is a prerequisite of the action, how can it be claimed that similar proof does not sufficiently show the injury to competing manufacturers, in a suit brought under a public statute where public injury and not private injury is the crux of the case?

Nor is the knowledge of wholesalers and retailers concerning a deceptive trade practice considered a defense in interpreting food and drug statutes.

In the case of *Libby, McNeill & Libby v. U. S.*, 210 Fed., 148, the Circuit Court of Appeals for the Fourth Circuit said (p. 150) :

"On the other hand, when it is alleged that a particular description, branding, or method of offering of goods for sale will enable one dealer to pass off his products for those of another, it is usually immaterial whether dealers in such articles are deceived or not. The inquiry in such cases is whether

the ultimate purchaser will be misled. Hopkins on Trade Marks, Sec. 106.

Pure food laws are intended to protect the public, whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The Supreme Court of Michigan has said that decisions construing revenue acts 'do not apply to cases arising under the pure food laws of state governments. Courts will take cognizance of the well-known fact that farmers, laboring men and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the Legislature wisely intended to give them.' *Armour & Co. v. Dairy and Food Commissioner*, 159 Mich. 10, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

We fully concur in this statement of the true rule of construction to be applied to pure food statutes, whether state or federal. It follows that learned judge rightly refused to instruct the jury otherwise."

See also:

*U. S. v. Rigney*, 220 Fed., 734.

In the case of *U. S. v. Two Cases of Chloro-Naphtholeum Disinfectant*, 217 Fed., 477, 480, where the Insecticide Law was involved, the Court said:

"(3) In substance the jury were instructed that a word does not become purely arbitrary until it has lost its descriptive significance both to the specialist in the subject

and to the general public. In this circuit it has already been determined that, where words in every day use are put upon labels, they will be held to have been used in their popular meaning rather than that which they have acquired among manufacturers and dealers. *Libby, McNeill & Libby v. United States*, 210 Fed. 148, 127 C. C. A. 14."

In the case of *Woolner & Co. v. Rennick*, 170 Fed., 662, 665, the Court had before it an application to enjoin the Internal Revenue Department from marking certain manipulated spirits as "imitation whiskey." It was alleged that the beverage had been long known to the trade only under the name "whiskey" and much testimony was offered to show that it was of substantially the same material. The Court said:

"The record also shows that diluted spirits treated with artificial coloring matter and essences are not sold to the trade as such, but are always presented under such labels, terms, and descriptions as import age and maturity, and which the consumer identifies with the genuine product whiskey. The regulation is in all respects reasonable, and is therefore legal. The fact that this practice has, to some extent, prevailed for many years, does not show in the complainants any right which the court should protect. It shows rather that the Commissioner of Internal Revenue has been tardy in promulgating a regulation which he had legal power to enforce even before Congress gave emphasis to the subject by the enactment of Food and Drugs Act."

In cases where the issue is the deception of the public by misleading brands or names, the Courts



have declined to apply decisions under the revenue laws involving the technical significance which ordinary words may have acquired in particular trades or industries.

*Armour & Co. v. Dairy & Food Commissioner*, 159 Mich., 10; 123 N. W., 580.  
*Libby, McNeill & Libby v. U. S.*, 210 Fed., 148.

In cases where trade marks are denied protection because of misrepresentation, deception of the public, and not merely deception of the trade, is sufficient.

*Manhattan Medicine Co. v. Wood*, 108 U. S., 218.  
*Newman v. Pinto*, 57 L. T. R., 31.  
*Kraus v. Peebles*, 58 Fed., 585.  
*Church v. Proctor*, 66 Fed., 240.  
*Palmer v. Harris*, 60 Pa. St., 156.  
*Connell v. Reed*, 128 Mass., 477.

The Circuit Court of Appeals refers to a custom of the trade to brand wool and cotton underwear as "Wool," "Natural Wool," "Austrian Wool," etc. Such a trade practice cannot be properly dignified by the term "custom" in its legal sense. In the absence of knowledge on the part of the consuming public, there is a fraud upon the public.

"The courts have held customs unreasonable \* \* \* (b) as conducing to fraud, dishonesty or extortion."

*Aske, Customs and Usages of Trade*, 173.

"That cannot be called a custom which is grounded upon fraud."

*Viner's Abr. "Customs,"* 188.

Whatever may be the rule as to presumptive notice of a custom or usage in the case of parties engaged in the same business, clearly no such presumption can be indulged in where the parties are engaged in different lines of business.

*Irwin v. Williar*, 110 U. S., 499, 516.

*Great Western Elevator Co. v. White*, 118 Fed., 406, 410.

17 *Corpus Juris*, 477-478.

The Merchandise Marks Act in England prohibits false trade descriptions. Under that Act the Board of Trade or Board of Agriculture undertakes a proceeding in cases "which appear to the Board to affect the general interests of the country or of a section of the community, or of a trade" (*Kerly, Merchandise Marks*, 139, 141), just as the Federal Trade Commission proceeds under this Act. The Board of Agriculture in an order of February 1, 1895, nearly twenty years before the passage of the Federal Trade Commission Act, expressed the opinion that misrepresentation of place of origin was "competition unfair in character" (*Kerly, Merchandise Marks*, 141).

Judicial interpretations of this law are persuasive in the instant case on the point in issue for the reason that it does not forbid (in the language of *Darling, J.*) "erroneous terms consecrated by common use," and in this connection those cases in which trade custom or trade knowledge has been urged in defense are of peculiar significance.

In the case of *Lemy v. Watson*, 3 K. B., 731 (1915), an appeal was heard in connection with a prosecution for improperly using the trade name "Norwegian Sardines" on fish which were not sar-

dines. The defendants laid emphasis upon Section 17 of the Merchandise Marks Act, which provided that where a trade description was lawfully applied at the time of passing of the Act, such trade description should not then be deemed forbidden by it. The Court had before it the question as to whether or not the name "Norwegian Sardines" had come to have a secondary meaning, so thoroughly understood that the name was lawfully applied to other kinds of fish than sardines, and the Court held, in opinions rendered by Lord Reading, Darling, *J.*, and Avory, *J.*, that a secondary meaning was not established unless the public as well as the trade understood the secondary meaning. Lord Reading said (at p. 750) :

"Lord Alverstone, C. J., pointed out that the object of the section was to protect the conventional descriptions, such as 'Brussels carpet,' and other secondary meanings which have grown up in the course of time and of which instances have been given during the course of the case. I am myself quite satisfied that you cannot have within the provisions of this statute a conventional description or secondary meaning unless both sellers and purchasers have adopted that description. There can be no conventional description or secondary meaning made by the trade, the seller, to which the public, the purchaser, is not a party. I come to the conclusion, therefore, that the Court was wrong when it decided that this trade description had been 'generally' applied before 1887."

Darling, *J.*, and Avory, *J.*, announced the same doctrine in their opinions and all three of the opinions are decidedly instructive as to the use of trade

names which are claimed to have an established secondary meaning.

In the case of *Wood v. Lambert & Butler*, 32 Ch. Div., 247 (Court of Appeal, 1886), Lord Lindley observed:

"It is not sufficient to show that those who are in the trade knew the facts, but the question is what the public knew. \* \* \* Persons in the trade, persons knowing the secrets of the trade, may not be deceived, but any buyer would be deceived by this. \* \* \* The trade itself knew that what was done was a juggle, but the public knew nothing about it. That, it appears to me, is the short ground upon which the claim of Messrs. Wood must fail."

Lord Lopes observed:

"I am at a loss to see how any common practice of that kind can assist the plaintiff in this case; nor indeed can I understand why it is the trade only that are to be considered."

In *Ford v. Foster*, 7 Ch. App., 611, 631, Mellish, *L. J.*, cites a guano case in which a number of witnesses testified that "everybody in the trade knew that Peruvian guano," unless the words "Genuine Gibbs" were added, meant an article made in England. They could not deny that when a farmer bought some to put on his fields, he thought he was buying guano from Peru. The sale was held to be a gross fraud.

In the *Leicester Case* (*R. V. Thomas Henry Downing*), *London Times*, Oct. 20, 1893, p. 6, defendant was charged with having applied a false

trade description to women's combination dresses and vests. The goods were marked "Natural Wool" and "Natural Cashmere" and were composed of half wool and cotton. Mr. Raymond prosecuted on behalf of the Board of Trade on the information of the secretary of the Nottingham Chamber of Commerce. It was urged by defendant that

"the term 'natural wool' was used by every draper and retailer with no sort of deception. \* \* \* He (defendant) supplied thousands of customers who were retailers, and his instructions to his travellers were to explain everything to the retailers. There was not one amongst all these customers who would say that he had been deceived. \* \* \*"

The magistrates found as a fact that the description was a false trade description under the Merchandise Marks Act and that the case was one which did not come under the exception of the 18th Section of the Act.

*Kerly, Merchandise Marks Act, 32-33.*  
*Sebastian's Law of Trade Marks, 676.*

Likewise in *Hills Trade Mark Case*, 10 R. P. C., 113, 117-118, the words "Forrest" and "London" used in a trade mark by a Coventry watchmaker were held deceptive and stricken from the register, notwithstanding evidence of a custom of the watchmakers of Coventry of putting these names on their watches although they had no connection with Forrest and no business or connections in London.

In view of the unanimity of these authorities, which approach this subject from so many different angles, it is respectfully submitted that where goods containing a false brand are sold in inter-

state trade, in competition with similar goods bearing an honest brand, and the public is deceived into buying the falsely branded goods, an unfair method of competition is established, without proving that the manufacturer's immediate customers are deceived, and without further proof of injury to competing manufacturers.

Respectfully submitted,

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# United States Supreme Court

OCTOBER TERM

No. 333

FEDERAL TRADE COMMISSION,  
*Petitioner,*

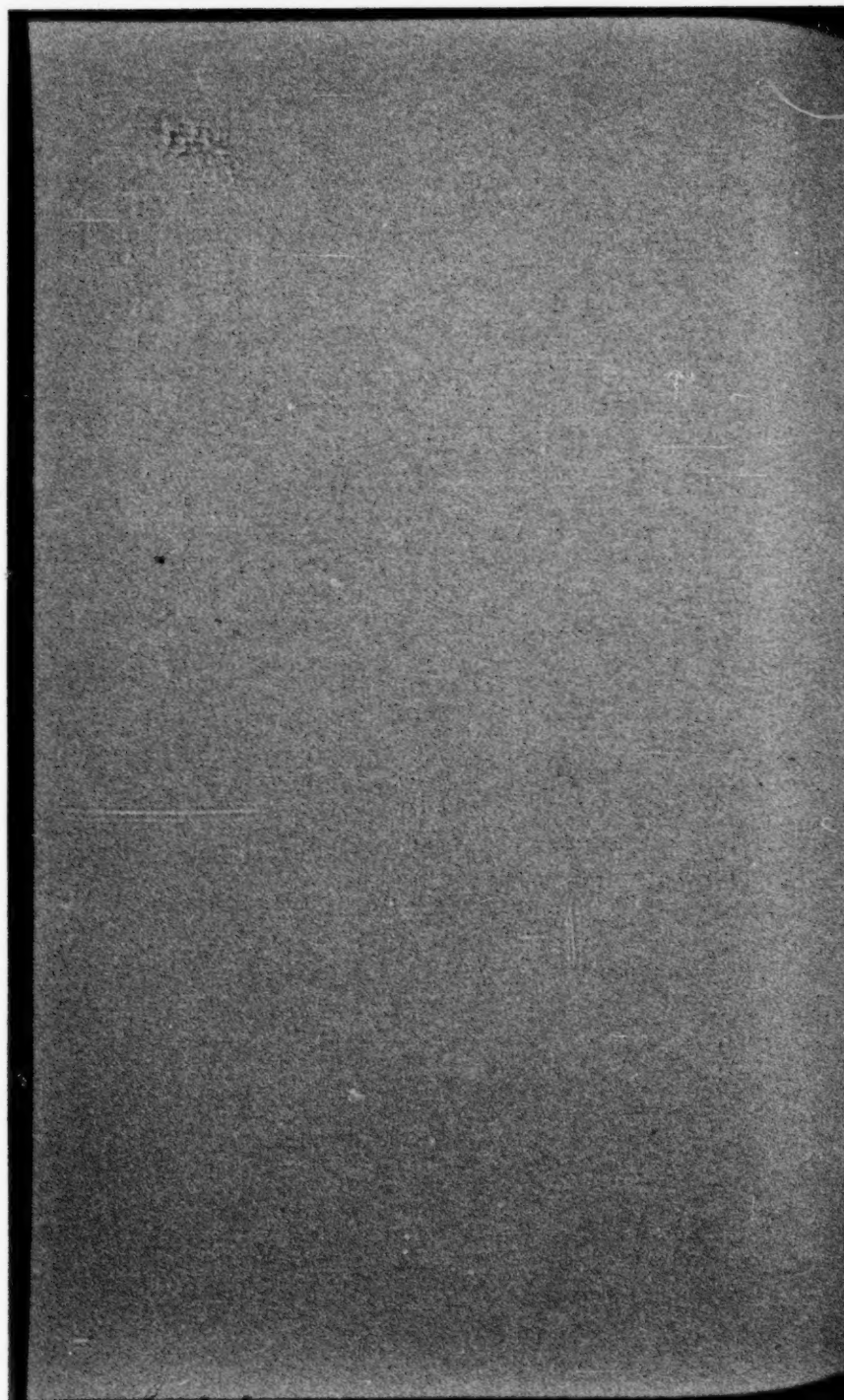
vs.

WINSTED HOSIERY COMPANY,  
*Respondent.*

## BRIEF FOR RESPONDENT

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HENRY P. MOLLOY,  
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To be argued by  
MELVILLE J. FRANCE.

## United States Supreme Court

FEDERAL TRADE COMMISSION,  
Petitioner,

vs.

WINSTED HOSIERY COMPANY,  
Respondent.

October  
Term  
1920

### **BRIEF FOR RESPONDENT**

#### **Statement of the Case**

The order of the Circuit Court of Appeals for the Second Circuit, which is under review by this Court, reversed an order of the Federal Trade Commission dated January 29th, 1920, commanding the Winsted Hosiery Company to desist from using the labels "Merino," "Worsted" and "Wool" on underwear, socks or other knit goods composed partly of wool, except (1) when the knitted fabric is made entirely of wool yarns of a kind specified or (2) when the terms describing the wool stock is joined with the name of other staple or staples contained in the knitted fabric.

The original order made by the Commission was based upon a statement of agreed upon facts.

When this proceeding came on to be heard before that Court, the Commission applied for an order, which was granted, to take additional evidence. At the conclusion of the taking of that evidence, new findings were made by the Commission and it is the order entered thereon, that is the subject of review.

Notwithstanding the 400 pages of testimony taken the facts so far as they are material to this controversy, are substantially the same as set forth in the statement of agreed facts.

That statement of agreed facts contained the following, which remains undisputed after all the testimony taken:

"Paragraph seven: That for the past 20 years it has been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as 'Natural merino,' 'Wool,' 'Natural wool,' 'Natural worsted,' and 'Australian wool,' when in fact such underwear so described is not composed wholly of wool, and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing underwear to meet the varying demands of the trade solicited and served, that this custom and practice is general and universal in the underwear trade throughout the United States and is followed by manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as 'all wool;' that large quantities of underwear and similar wearing apparel has been imported into the United States from foreign countries and

it comes into direct competition with the underwear manufactured in the mills throughout the United States; that the underwear and similar wearing apparel so imported into the United States has been and now is labeled, branded, and advertised as 'Wool,' 'Merino,' and 'Worsted' underwear in accordance with the general custom and practice in the underwear trade in the United States, although the said underwear is not composed wholly of wool, but, on the contrary, is composed partly of wool in varying percentages" (fol. 30).

The Winsted Hosiery Company has for many years been engaged in the manufacture of underwear which it sells to retailers (Paragraph Eight of Findings of Commission, fol. 92). *It does not sell its product in any other way. Its business is conducted exclusively with members of the underwear trade.* The fact is undisputed that the company's standing is among the highest and best in the industry' (fol. 719): "*It stands at the top.*"

The story of this litigation follows:

*In labeling and branding the boxes in which the company's goods were placed and delivered to retailers, it followed practices and customs which admittedly were general throughout the United States in the underwear trade* (Paragraph Seven of Stipulated Facts, fol. 30; Paragraph Twenty of Findings of Fact, fol. 94).

It had labeled certain of its products as

"Men's Natural Merino"

"Men's Gray Wool Shirts"

"Men's Natural Wool Shirts"

"Men's Natural Worsted Shirts" and

"Australian Wool Shirts."

following a universal custom in the industry, when in October, 1918, a complaint was lodged against it by the Trade Commission (fol. 16). Startled by this summary procedure it answered setting forth that it was following a general and universal custom and naming scores of manufacturers who were doing the same (Answer, fol. 23). This resulted in proceedings by the Commission against these manufacturers. As a result the Association of Knit Goods Manufacturers of America of which the petitioner is a member met in October, 1919, and adopted the following resolution:

“RESOLVED, that it is the sense of this Conference that the general practice followed by each of the manufacturers in labeling and branding underwear manufactured by them as Merino Cashmere, Worsted and Wool Underwear, when in fact such underwear is not composed wholly of wool, but is composed in part of wool, varying in the percentage thereof to meet the varying demands of the trade solicited and served by them, is not done with the purpose, intent and effect of stifling and suppressing competition in the manufacture and sale of underwear, and that such brands and labels are not false and are not misleading and not calculated and not designed to, and do not, deceive the trade and general public into the belief that such underwear is manufactured and made and composed wholly of wool and which fact is universally known and understood by the manufacturers, jobbers, retailers and consumers of underwear throughout the United States, and elsewhere; and

“FURTHER RESOLVED, That it is the sense of each and every manufacturer present at this conference that the welfare of the

underwear industry makes it necessary and advisable to answer and defend the proceeding brought against them respectively by the FEDERAL TRADE COMMISSION, to the end that the charge that they and each of them have been and are practicing any unfair methods of competition or deception to the public be effaced from the records" (p. 312).

A Committee was appointed at the same meeting of which Lincoln Cromwell was chairman, to investigate the subject of labelling and to prepare a report for submission to the association. It did so and submitted the results of its labors to a general meeting of the association and its report was adopted. (Exhibit #9.) The report stated:

"We find that all of the descriptive terms complained of by the Federal Trade Commission have been used on the labels for the same underwear for a number of years, in some cases for nearly half a century, and that these products are to-day among the most popular and respected in the country, showing beyond question that these manufacturers have kept their customers through the intrinsic value of their products which the consumer has worn, and not through wordings on labels of boxes usually left in the retail store.

"Neither the jobber nor the retailer buys his underwear under the influence of box labels. Samples are not shown in boxes. They carry only our price tickets. With the underwear manufacturer the label has been an after-thought, because it played no part in his selling. Your committee believes that the Federal Trade Commission exaggerated the influence which labeling of underwear boxes can have under the American system of retail selling where reputable stores practically warrant the value of

all goods sold. We are, however, so jealous of the fair name of our industry, and of our individual reputations for fair dealing, that we have considered this complaint in the broadest way with the sole object of freeing the industry from any abuses which may have been made of our labels by dealers over whom we have no control, because of words used on the labels which meant one thing to the manufacturer and the dealer, but were capable of being misunderstood by the public.

"It is fair to suppose that the public will assume that any word on a label carries the meaning given in one of the standard dictionaries. We have taken the definitions in the Century, the Standard, the International and Worcester's dictionaries of all the words complained of, including *wool*, *natural wool*, *woolen*, *merino*, *woolen merino*, *worsted*, *cashmere*, *camel hair*, and basing our suggestions on these dictionary meanings rather than upon any understanding of them by manufacturers and dealers, we offer the following table of descriptive terms, setting opposite each class of underwear three lists of descriptive terms now used to describe it on box labels. In the first list are words which are not only beyond any chance of criticism, but are approved by the experience of many large distributors. They limit the label to its simplest terms, such as the mill name, the brand name, and the word undershirt, union suits, etc., with the color, size and quantity, and define the quality in exact terms, such as 'Wool Underwear' or 'Worsted Underwear,' both meaning *all wool* knitted fabrics. In the second list is a set of words which are clearly permissive under the dictionary definitions, and while they are not so definite as the first list, we see no reason why mills using them should



change their labels. The third list contains words which we believe are properly complained of because they could be used by an ignorant or dishonest clerk to deceive a customer as to the material content of the underwear" (p. 407).

Among the words which the committee held were clearly so permissive and for which it saw no reason why the mills using them should change their labels, were:

"Worsted Merino Shirts"

"Worsted Merino Suits"

"Woolen Underwear"

"Merino Underwear." (Exhibit # 9.)

(pp. 408, 409.)

This petitioner, a signer and supporter of this report, accepted its recommendations and rulings. Irrespective of the power of the Commission it desired as an honest and upright manufacturer to deal with the subject fairly and justly.

When, however, the Commission arbitrarily and in defiance of what it must have seen was the accepted fact, decided and ruled that the term "merino" should not be used in accordance with the definition of standard dictionaries and of trade and custom for fifty to seventy-five years, this petitioner brought the matter for review to the Circuit Court of Appeals.

Apparently believing that the facts which it had stipulated were the facts and *which are the facts*, were insufficient to sustain its arbitrary ruling, the Commission attempted to vindicate its order with the testimony which has been taken. *This testimony, so far as it is relevant does not vary or alter the original stipulation.*

At the outset of the taking of the evidence counsel for the petitioner offered "to accept the order of the Commission as made on the date of January 29, 1920, excepting in so far as the word 'Merino' is directed to be abandoned" (fol. 111). This was done under the desire of the petitioner to show, as it had theretofore, that it was in accord with the spirit which had actuated the manufacturers generally in meeting the complaint lodged against them in so far as there might be any reasonable basis for the same irrespective of any question of the powers of the Federal Trade Commission.

Notwithstanding this offer the counsel for the Commission insisted upon going over the whole subject and that is one reason this record has grown to its present size.

*All the witnesses examined and the evidence produced was by the Federal Trade Commission; the petitioner offered no testimony, being satisfied that the additional testimony but established the facts found in the original stipulation.*

The additional testimony and evidence adduced is subject to classification under three headings:

1. Testimony from the trade and industry as to the meaning and use of the word "merino."
2. Testimony from a carefully selected number of the general public as to the same.
3. Definitions from general and trade dictionaries and "opinion" evidence as to what the *general public* believes or thinks.

## (1)

*Testimony from the trade and industry.*

Out of 36 witnesses—retailers, jobbers and manufacturers—called by the commission, 34 stated that “merino” for scores of years had been used to define a mixture of cotton and wool. These men were from New York, Massachusetts, Vermont, Connecticut, Pennsylvania and Washington, D. C., and represented in many cases the largest, most prominent and most respected manufacturers, jobbers and retailers in the East. Two found in Washington claimed ignorance of it, one of these being a relative of the employee of the Commission who was engaged in preparing the Commission’s case, the other a small haberdasher. Many of these witnesses also testified that from their knowledge the public understood “merino” as applied to underwear to mean cotton and wool.

The following are excerpts from their testimony:

Mr. Edward B. Gaylord, at folio 133, testified:

*By Examiner McKeag:*

Q. Before you leave that I should like to ask a question to satisfy my own curiosity. How long has the word “merino” been used on this class of goods by your company? A. Since 1882.

Q. What was the object of adopting that sort of a label on that brand or type of goods? A. Because it describes the fabric known in the trade as a mixture of wool and cotton.”

At folio 159:

*“Cross examination by Mr. Molloy:*

Q. Mr. Gaylord, what do you understand

to be the meaning of the word "merino" as used generally in the trade, and known publicly as it applies to garments in your industry? A. A mixture.

Mr. Clark: I object to his expressing an opinion on that.

Mr. Molloy: You have asked him.

Mr. Clark: No; I have not asked him.

Examiner McKeag: He may answer subject to the objection.

Mr. Clark: I object on the ground that he is not an expert, at least as to the public knowledge and understanding of the term.

A. A mixture of wool and cotton.

*By Mr. Molloy:*

Q. Regardless of the percentages of wool or cotton in the fabric? A. Yes."

Mr. Ernest Levit, at folio 167, testified:

"Q. I am not asking you on that, what your understanding is of the meaning. I am asking you if you have been able to form an opinion from your experience as to what the public understands by the term "natural merino"? A. Eliminating the word "natural" I can answer the question.

Q. Very well, answer the question—by the public? A. Cotton and wool mixed.

Q. That is your opinion, is it? A. Yes.

Q. That the public understand it to mean cotton and wool?"

Mr. Ernest Levit, at folio 169, testified:

*By Mr. Clark:*

Q. My question is directed to your experience, as enabling you to judge of what the purchasing public, as distinguished from the salesmen and retailers, understand, independently of your understanding as a salesman, what the public understands by the term "natural merino," or "merino." A. I have no means of answer-

ing that question as to the public. "The public" is a very broad assertion. That means everybody. We tell them that it is a merino garment. Salesmen have been telling them that for years and years, and they make the remark, 'How much wool is in it?' We say 'About 50 per cent.' I imagine that the customer, the consumer, or the public, would come to that conclusion, the same. Salesmen have had it for years."

The same witness, at folio 175, testified:

"Q. From your observation, what is the reason which leads you to think that the public does not still attribute that meaning as applied to underwear? A. As I say, they have come to accept the term, as far as I have observed from my own connection with the public, as being part wool and part cotton."

At folio 176, he also testified:

"Q. You state that in your opinion the public, by the information which it obtains from the salesmen, understands merino to be wool and cotton. Now, if on the contrary the public understood that it meant wool, there would, of course, be some objection to the retailer in his sales, in withholding the fact that it was cotton as well as wool. I ask you if you think from the point of view of the retailer there is any objection to adding the term 'cotton' to merino? A. My personal opinion is that the word 'merino' is so well understood that there would not be any use to add the word 'cotton' to the word 'merino.'"

At folio 178, he further testified:

"Q. Suppose a retailer has a lot of underwear in a box with the label 'natural merino' on it. Don't you think that gives

an opportunity to him to represent the goods as being all wool? A. As a salesman I have never seen it represented as being all wool.

Q. I ask you not from your own experience, but whether you do not think it is capable of that use? A. I do not think so. As I stated before, 'merino' has been generally accepted, in my opinion, as being a term for a mixture of wool and cotton."

The same witness, at folio 179, testified:

*"Cross examination by Mr. Molloy:*

Q. Mr. Levit, it means the same thing to the purchasing public, doesn't it, as you have come in contact with it as a salesman and the head of a department, that you testified to? A. That the term 'merino' means a mixture?

Q. Yes. A. That is my observation; yes.

Q. Have you, during your twenty years' experience, ever had any objection made to you by a customer that an article marked 'merino' did not contain 100 per cent. wool? A. Well, I would not say 'never.' All I can do is to repeat that they accept the term as meaning a mixture."

The same witness, at folio 184, testified:

"Q. In handling merchandise so marked by the Winsted Hosiery Company, as I understand your testimony it was that the word 'merino' meant a garment manufactured from a mixture of cotton and wool? A. That would be my understanding.

Q. And when you handled that merchandise you so regarded that merchandise? A. So I did.

Q. And in dealing with that merchandise to the customers of the various stores in which you handled it, as far as your experience goes, you understood it to be a

garment made of a mixture of wool and cotton? A. I think they did."

Q. Would the description of the words 'cotton and wool' add anything more to the meaning of a fabric marked 'merino' than does the word 'merino'?"

The same witness, at folio 187, testified:

*By Mr. Clark:*

Q. I want to know whether you feel able to say that it is the universal idea of the purchasing public that 'merino' means wool and cotton? A. My conclusion is that it does mean wool and cotton and that the public I have handled so understand it.

Mr. Clark: That is all."

Mr. Gordon A. O'Neill, at folio 190, testified:

"Q. In your opinion based on that experience what does the general public understand by the term 'natural merino' as used in underwear? A. Why, the public would figure that that was a mixture.

Q. All of them? A. Yes.

*By Mr. Molloy:*

Q. A mixture of what?

*By Mr. Clark:*

Q. A mixture of what? A. Of wool and cotton."

The same witness, at folio 195, testified:

*"Cross examination by Mr. Molloy:*

Q. There has been no misunderstanding as far as your experience indicates as to the knowledge of the customers generally in buying a merino garment, of understanding that it is a mixture of cotton and wool? A. That is right.

Q. So that to mark it cotton and wool would not add anything to the present meaning as the purchasing public understand the use of that term. A. No; that is right.

Q. So that it would merely be a matter of optional description to bring home to the purchaser what the garment contents were? A. Yes."

Mr. Howard F. Myer, at folio 202, testified:

"Q. In your experience as salesman you came in contact with purchasers of underwear naturally? A. Yes.

Q. And did you from your experience and observation form an opinion as to the general public's understanding of the term 'natural merino' as applied to underwear? A. To a certain extent, yes.

Q. What is your opinion of their understanding? A. When I first went in the business 'merino' was supposed to be a mixture of cotton and wool, in the trade."

The same witness, at folio 204, testified:

"A. The public that I come in contact with myself personally, in selling goods, we always told them that merino was a mixture of cotton and wool.

Q. What was the occasion of your telling them that? I want to learn if I can what was their understanding before they got that information from you or from salesmen? A. That I could not say.

Q. Have you known of any instances where customers in some way or other showed that they had bought mixed goods under such labels as 'all wool?' A. I never had such cases."

The same witness, at folio 205, testified:

"Q. Do you use the term 'merino' or 'natural merino' on the goods you sell? A. No, sir; we do not use it.

Q. Why not? A. For the simple reason that, as I stated before, it was brought to the attention of us some while ago; there was a dispute over that at one time. The contention was that merino—as I said we



had always known it as a mixture for years, but this dispute was brought up, and we were forbidden to use the word 'merino' because they claim that 'merino' in the first analysis was an all-wool garment, and we do not use that term."

At folio 209, he further testified:

"Q. Do you recall seeing in the press an announcement of proceedings brought by the Federal Trade Commission against the manufacturers of wool underwear, charging them with mislabeling and misbranding their products? Do you recall that? A. I can recall something of that; yes.

Q. Is it not a fact that the order came down from upstairs about the same time that you observed that in the daily press—about the same time? A. I imagine so. I could not say positively.

Q. A little over two years ago? A. I think it was around that time.

Q. And it was because of that notoriety that questioned the proper description of merchandise by the use of the word 'merino' that your house, to avoid any possible misunderstanding, directed the discontinuance of the use of the word? A. I believe that was the idea.

Q. But up to that time and at that time in your experience as a buyer and salesman it was generally understood by you and the public which you serve that 'merino' was a term used to describe a fabric composed partly of wool and partly of cotton? A. Yes."

Joseph L. Daly, at folio 214, testified:

"Q. As to 'merino'? A. 'Merino'—some people understand it as wool and cotton, and others do not."

Same, at folio 221:

"I am not asking you what somebody else can figure. I am just tasking you your understanding of what the public impression is in dealing with your house, as one who has gained an experience through that number of years in your position. In other words, has there been any time that the public that you have served understood the word 'merino' as meaning all wool? A. The public that I serve—no."

The same witness at folio 223, testified:

"Q. In your twenty years' experience did you ever hear of a product being offered to the trade generally as being made entirely of a yarn woven from merino sheep? A. No."

James J. Leary, at folio 229, testified:

"Q. In your opinion do some of the purchasing public understand by the term 'natural merino' an all-wool garment? A. No."

"Q. In instructing your salesman in offering these two numbers, what instructions were given to the salesman in offering them to the purchasing public? A. That they were part wool.

Q. And part cotton? A. And part cotton.

Q. In order to give them that information you must have obtained it from some source? A. Yes; but from boyhood we got them.

Q. So you did have knowledge, and a knowledge going back, say, some twenty-odd years, that merchandise marked 'merino underwear' was part cotton and part wool? A. Yes."

The same witness, at folio 241, testified:

"Q. In your contact with the customers generally have you ever heard any objection raised or doubt expressed by the customers as to the meaning of the word 'merino'? A. No; I never have."

Mr. Solomon Wright, Jr., at folio 259, testified:

*"Cross examination by Mr. Molloy:*

Q. Mr. Wright, do you know what is generally known in the industry as a merino worsted yarn? A. Yes.

Q. Tell us what you understand that to mean? A. A percentage of cotton and wool.

Q. That is a yarn made by a mixing of cotton and wool? A. Yes."

The same witness, at folio 262, testified:

"Q. Do you know what is generally understood to be meant in the trade as a merino underwear garment? A. Yes.

Q. Tell us what you understand that to mean? A. A composition of cotton and wool.

\* \* \* \* \*

Q. When you say that during your connection with the industry, that includes from 1894 down to and including the present time? A. Yes.

Q. During that period what have been your activities in the industry—solely that of a manufacturer, or of a distributor as well? A. Both.

Q. As a distributor did you come in contact with the purchasing trade throughout the country? A. Yes.

Q. And can you tell us whether the word 'merino' from your experience in the trade in coming on contact with them in that manner has always understood the word 'merino' as it applies to underwear to

mean a garment partially composed of cotton and partially composed of wool? A. Yes."

Mr. William Rowan, at folio 269, testified:

"Q. Have you had occasion to learn from your relations with your salespeople and with customers the public's understanding of those terms?

"By Examiner McKeag:

Q. Answer yes or no? A. Yes.

By Mr. Clark:

Q. And what do you understand to be the understanding of the public of the term 'merino'? A. A mixture of cotton and wool."

Mr. Charles Caulkins, at folio 276, testified:

Q. From your observations and knowledge gained as a salesman and buyer are you able to state what the average purchaser understands by one or more of those terms? A. I understand, I will say, that the purchaser understands that a merino garment is a cotton and wool garment.

Q. Generally? A. Generally, yes."

The same witness, at folio 281, testified:

"Q. Has it ever come to your knowledge through the customers of your store that a customer understood a 'merino' garment to be other than a garment made of a mixture of wool and cotton? A. No, sir.

Q. In the labels used by the Winsted Hosiery Company is a number known as 'Men's Natural Merino Shirts,' introduced in this proceeding as Exhibit 1. What would you understand from an inspection of that label to mean? A. A cotton and wool garment.

Q. There is another brand put out by the Winsted Hosiery Company known as

Men's Gray Merino Shirts,' being Exhibit No. 2 in this proceeding? What would you understand would be the contents of that garment? A. Cotton and wool.

Q. There is another number known as 'Men's Gray Merino Shirts,' being Exhibit 3 in this proceeding. What would you understand to be the contents? A. 'Gray Merino Shir'?

Q. 'Gray Merino Shirt.' A. Cotton and wool."

Mr. William C. Lyons, at folio 293, testified:

"Q. You stated that for the last thirty years you understood that the word: merino' meant a mixture of wool and cotton?

A. Yes. I would not say that far back. But thirty years ago we sold merino underwear as an all-wool garment.

Q. But since then you have understood it to be a mixed garment? A. Merino—absolutely.

Q. A mixture of wool and cotton? A. Yes."

*Cross examination by Mr. Molloy:*

Q. You stated that for the last thirty years you understood that the word 'merino' meant a mixture of wool and cotton?

A. Yes. I would not say that far back. But thirty years ago we sold merino underwear as an all-wool garment.

Q. But since then you have understood it to be a mixed garment? A. Merino—absolutely.

Q. A mixture of wool and cotton? A. Yes.

Q. And that use and understanding of the term 'merino' has been generally understood with those that you have come in contact with in your store for the same period? A. As a mixture of cotton and wool?

Q. Yes. A. To the best of my knowledge and belief, yes.

Q. And you have never heard it questioned otherwise by those you have come in contact with in the last twenty years, we will say? A. I do not think so; no.

Mr. Otto Rosenberg, at folio 298, testified:

“Q. Can you state from your experience and observation what the average purchaser understands by the term ‘merino’ as applied to underwear? A. They understand it cotton and wool, but there are very few people who speak of merino. The public very seldom use the term ‘Merino.’ I have very seldom heard them use it.

Q. Would you say that they all understood it to be cotton and wool? A. Yes; that is what I understand it. I have not seen anything else but cotton and wool in my time marked ‘Merino.’

Q. And so as a buyer you understand the term to mean cotton and wool? A. Yes”.

The same witness, at folio 306, testified:

“Q. Irrespective of the application of the term to underwear, what do you understand by the term ‘merino’ as applied to wool? A. Merino—wool and cotton.

Q. No, as applied to wool? A. Applied to wool?

Q. Yes. A. A mixture.

Q. I said as applied to wool alone? A. No, you can not put them together. One is a wool and the other is a mixture, or else I do not get you right.”

Mr. Frederick T. Hooper, at folio 312, testified:

“*Cross examination by Mr. Molloy:*

Q. Mr. Hooper, it is your understanding, both as a buyer and generally, as one of three years’ experience in your depart-

ment, coming in contact with your customers, that the word 'merino' means a mixture of wool and cotton? A. Speaking from the standpoint of the understanding of the customer, yes."

Mr. Arthur M. Reis, at folio 320, testified:

"Q. In your opinion is there any ambiguity in the understanding of the public as to the meaning of the term 'merino' used on labels? A. No; 'Merino' is a term that has been used during my entire experience in business, and has a meaning that has been generally accepted since the time I have been in business, which has been about 18 years.

Q. Is there any distinction to be made in the understanding of the term as between the trade; that is, manufacturers and dealers in underwear, and the purchasing public who are not in the trade in any way? A. In so far as the word 'merino' is concerned?

Q. Yes. A. I don't believe so.

Q. Do you think it is universally understood by the public and by the trade? A. It is universally understood by the trade without question. I being in the business so many years, the word 'merino' means something very clearly to me. I can not give the consumer's point of view."

The same witness, at folio 324, testified:

"Q. You stated that it is the policy of your house to have conferences in your trade, and with your retail salesmen who distribute your merchandise. Have you ever heard any one express a doubt or an ambiguity as to the meaning of the word 'merino' at those conferences? A. No, sir.

Q. Did you ever hear any of the salesmen express any uncertainty of the pur-

chasing public that the salesmen came in contact with, as to the meaning of the word 'merino?'

\* \* \* \* \*

Q. I will ask you if it has not been a general custom and practice in the underwear business to manufacture, label, advertise, and brand underwear and such wearing apparel as 'Natural merino,' 'Wool,' 'Natural wool,' 'Natural worsted,' and 'Austrian wool,' when in fact such underwear so described is not composed wholly of wool and is composed only in part of wool, varying in the percentage of wool according to the different mills manufacturing such underwear to meet the varying demands of the trade solicited and served; that this custom and practice is general and universal in the underwear trade throughout the United States, and is followed by the manufacturers engaged therein; that there are a few manufacturers of underwear whose products are composed wholly of wool, and are branded and labeled as 'All wool?' Is that correct? A. That is correct.

Q. Are you familiar with the importation of underwear into the United States? A. To a measure; yes.

Q. Has not that same general custom prevailed as to imported underwear as well as domestic?"

Mr. Thomas E. Pendergast, at folio 355, testified:

"Q. In other words, that there may be some doubt in your own mind as to the correct meaning of the word 'merino' as indicating an all-wool garment? A. That is it exactly.

Q. In other words, that you may be wrong, and they may be right? A. Quite so."



The same witness, at folio 360, testified:

"Q. What do you understand is their impression as to the term 'Natural merino'? A. 'Natural' gives the significance of shade.

Q. But all wool? A. No, sir; just simply applying to the color, that is, of natural wool.

Q. When the American Hosiery Company, for instance, calls a garment a 'merino' garment, what do you understand that to mean? A. They simply use that as a trade term, I expect. When we bought or sold a garment with the word 'Merino' on it, it was not bought or sold as an all-wool garment.

Q. And when you purchased it and received from them a garment termed 'merino,' you understood that you were buying and receiving a garment made of a mixture of cotton and wool? A. Exactly.

Q. And you sold it as such? A. Yes; I represented it in my old place, and am educating the sales people to represent it at present on that basis.

Q. What stamping is on a garment made of a mixture of cotton and wool? A. None on the domestic. I am referring to the American Hosiery Company. Their garments have been stamped 'Super Merino' or 'Merino,' and like that.

Q. And when so marked, your salesmen understood it to mean a garment made of a mixture of cotton and wool? A. Exactly.

Q. And it was so offered to the customer as such? A. To our best knowledge it was. It was so represented to our clerks.

Q. Have you ever had occasion when anyone who came into your store as a cus-

tomer, questioned the fact that the merino garment did contain a mixture of cotton and wool? A. Not to my knowledge.

Q. Not to your knowledge? A. No.

“Q. During your experience as a salesman and buyer, familiar with the department, did you ever experience an occasion when a customer stated, in asking for a merino garment, that he expected to get an all-wool garment? A. My impression on that would be no.”

Mr. Harry C. Buteux, at folio 375, testified:

“Q. You distribute that particular line of underwear made by the New England Knitting Mills to various retailers? A. Yes.

Q. How was that line of garments heretofore labeled? A. It was only labeled the way we asked them to label it.

Q. How did you previously to the labeling as cotton and wool have it labeled? A. We had it labeled sometimes ‘part wool’ and sometimes ‘merino.’

Q. And that line of goods was distributed under the label ‘merino’ as well as ‘cotton and wool’ heretofore by you? A. Not ‘cotton and wool’ but ‘part wool’ or ‘merino.’

Q. ‘Part wool’ or ‘merino’? A. Yes.”

The same witness, at folio 378, testified:

“Q. When you purchased those articles you understood that you were getting a garment made of a mixture of cotton and wool, did you not? A. Yes, we did.

Q. And sold them as such? A. We did.

Q. And the customers who bought them from you understood them to be a mixture of cotton and wool? A. I always understood it that way.

Q. Is it not a fact that it has always been understood as far as your experience goes

at least that the use of the word 'merino' has been to indicate an underwear made of a mixture of cotton and wool? A. That has always been my understanding.

Q. Did you ever hear any question raised as to the fact? A. I don't believe I ever did."

Mr. David J. Moses, at folio 391, testified:

"Q. You have had fifteen years' experience in underwear and gentlemen's furnishings? A. In underwear and gentlemen's furnishings.

Q. And during those years of your experience have you ever heard anyone express a doubt that the word 'merino' means a garment manufactured of a mixture of cotton and wool? A. Yes.

Q. You have never heard of it? A. I have. That is the customer's impression, that 'merino' would mean a mixture of cotton and wool."

Mr. Frank S. Turnbull, at folio 400, testified:

"A. We had to instruct our salesmen. Some of more experience than others may have known that merino is not all wool, but we instructed our salesmen what 'merino' meant, and 'Australian wool' and these other terms; that they did not mean all wool."

The same witness, at folio 404, testified:

"Q. The use of the word 'merino' in connection with underwear has always meant to you a mixture of cotton and wool, has it not? A. It meant to me a mixture of cotton and wool when we come to analyze it and buy it; yes.

Q. In other words, when you buy merino underwear from the manufacturer you expect to receive from him a garment made of a mixture of cotton and wool? A. As a buyer we do; yes.

Q. And a manufacturer in selling garments with that brand or number, he would expect to deliver to you a garment made of a mixture of cotton and wool? A. I do not know as to that. I know I would expect, from the underwear trade generally, if he said 'merino' we would expect a garment composed of wool and cotton."

Mr. George Fuller, at folio 439, testified:

"Q. And I understand your testimony to be that your knowledge of the use of the word 'merino,' applied generally, as distinguished from its technical meaning in the trade, is that it means an article made of all wool? A. Technically that is true, but practically in the trade it is not."

The same witness, at folio 447, testified:

"Q. George S. Cole, in his dictionary of dry goods, edition of 1890, quotes as follows:

"'Merino' is also the term applied to a variety of medium weight knitted underwear which was formerly made of pure merino wool, but now of cotton, or half and half.'

In the edition of 1892, which he quotes:

"'Merino' is also a term applied to a variety of medium weight soft finished knit underwear formerly made of merino wool, but now of cotton and wool mixed.'

Q. Then I understand, Mr. Fuller, that Cole was all wrong? A. No; I agree with that; but there is a great difference between the trade and what the consumer thinks.

Q. Then Cole was right, but Webster was wrong? A. I have not heard you read Webster. I admit that Cole is right.

Mr. Molloy: I offer Webster's New International Dictionary definition:

‘Merino. A fine fabric originally of merino wool, but later of fine wool mixed with cotton.’

Q. Mr. Fuller, do I understand that that definition is all wrong? A. I admitted previously to your reading either of them that that was the case.

Q. That they are both wrong? A. No; that they were both right. In my previous testimony I admitted that that held true.

Q. So that the dictionary generally used described merino as a fabric made of part wool and part cotton? A. Yes.

Q. Then what reason have you to believe or to state that it is your opinion that the general public believes that the word merino means a fabric of all wool when the ordinary dictionary of the day describes it as a fabric made of part wool and part cotton? A. Because undoubtedly Webster and the other man went to the trade to find their term and what it expressed, and they did not go to individuals. They went to manufacturers, the same as I can and the same as you can and other people can, and the terms that apply to the manufacturers do not in all cases apply to the consumer.”

Mr. Robert E. Walker, at folio 455, testified:

“Q. You say they have been marked that way for eighty years? A. I think seventy-five or eighty years the mill is up there.

Q. And the word ‘merino’ has been used as describing a mixture of cotton and wool during that period? A. That is the way we designated what was in use.

Q. Was there ever a complaint lodged against you, as far as you know, as to the impropriety of using the word ‘merino’ in describing a fabric containing part wool and part cotton? A. Never.

Q. And your only reason for discontinuing the use of that word in describing the

article made of that composition was because the Federal Trade Commission instituted this and similar proceedings? A. That is the only thing."

The same witness, at folio 456, testified:

"Q. Have you ever heard anybody in the trade, manufacture, distribution, or the public at large, question as to the meaning of the word 'merino' as indicating a fabric containing part wool and part cotton? A. I never did.

Q. How long have you been connected in the industry? A. I guess pretty nearly thirty-five years.

Q. During that period in what capacity? A. Selling agent, going around to the mills and things like that, and buying.

Q. During those years of experience you have come in contact with the public at large in connection with your merchandise? A. Yes.

Q. Have you come in contact with the retailers? A. Yes.

Q. And the salesmen in retail stores? A. Yes.

Q. Have you ever heard the salesmen or the retailers or anyone connected with the distribution of underwear marked 'merino' say anything that would indicate to you any impression on the part of the general public that purchased these garments that they contained anything other than wool and cotton? A. No."

Max Kuhn, at folio 464, testified as follows:

"Q. You say you have changed this manner of labeling your boxes in the last year or so? A. Yes.

Q. Has it not been a fact that you have changed it, as other manufacturers have, since the commencement of these proceedings? A. Precisely. Not these proceed-

ings, necessarily. We have changed it, because as the previous witness stated, it has been a sort of bugaboo. Everybody got to talking about the possibilities, and we did it in order to avoid any complication.

Q. Due to the publicity given the proceedings brought by the Federal Trade Commission, attacking the propriety of using the phrase? A. Exactly.

Q. In other words, as the last witness has testified, your house did not want to be in a position of having the Government charge you as being unfairly dealing in competition by the use of fraudulent or misleading or deceptive phrases or brands? A. Precisely. This is so.

Q. Before that time you branded and labeled your merchandise by the use of the same descriptive terms that other manufacturers used? A. As far as I know.

Q. And that custom existed for a great many years? A. I have been in the line myself 32 years, and I have never known it to be anything different.

Q. Have you in your experience ever heard anyone in the trade generally or among the public at large who buy underwear question the impropriety of the use of those words and phrases? A. Not at all.

Q. You are familiar with the use of the word merino as applied to underwear? A. Yes, I think so.

Q. Is it not your understanding that that word as applied to underwear has generally been understood by the trade at large and the public generally as a word meaning a fabric made from wool and cotton—part wool and part cotton? A. Yes, only."

Mr. Stanley Lansburgh, at folio 494, testified:

"Q. From your experience as salesman and superintendent of the underwear departments, have you an opinion as to the

understanding that the public has of the term 'natural merino' as applied to underwear? A. I don't think they——

Q. Have you an opinion? A. Yes. I have always figured that the public felt that merino was a mixed wool and cotton garment."

The same witness, at folio 499, testified:

"Q. In the underwear trade, outside of this one particular instance that you have mentioned, where there was a garment sold for 50 cents which was marked 'merino' and which was all cotton—eliminating that one instance—'merino' has always meant, in your experience and knowledge, a garment made of cotton and wool? A. Yes. I believe that the majority of the public feel that way, too."

Mr. Carlton L. Crymes, at folio 503, testified:

"Q. And from your experience in contact with the public, in their purchase of underwear, what is your understanding of the public's understanding of the term 'natural merino'? A. Well, I believe that they would consider wool being in that garment by using the name 'natural merino' when selling it to them.

Q. That it was all wool? A. Not all wool; no, but they probably believe that it is partly wool, although at the price that that garment is sold, nobody would expect it to be a wool garment."

The same witness, at folio 513, testified:

"Q. Did you ever have a customer, in your experience, ask for a merino garment, indicating that he expected an all-wool garment? A. Well, I can not say that I have. When you show them this garment, as I have previously stated, the first question they will ask is 'Is it wool?' because it has



every appearance of being wool. But they will never ask—when they want a wool garment they will ask for a merino garment. They will ask you outright for a wool garment.

Q. But you never heard a customer who wanted a wool garment ask for a merino?  
A. I think not; no, sir."

Mr. Sidney H. Reizenstein, at folio 522, testified:

"Now, assume a case of a dishonest sales-

"Now, assume a case of a dishonest salesman, if such exists, and the existence, in the store where he is acting as salesman, of underwear in boxes labeled 'merino.' In your opinion, is the state of the public's mind such as to the meaning of that term that it lends itself to a misrepresentation, in the case of the sale of mixed cotton and wool goods, that the goods are all wool? A. I do not think so."

Mr. Isidor Lawrence Goldheim, at folio 534, testified:

"Q. 'Merino,' at least in the underwear trade, means a garment made of cotton and wool, does it not? A. That has always been the understanding.

Q. I thought that, but I was a little misled by one of your answers. So far as the trade itself is concerned, there never has been any question in the mind of a retailer, so far as you know, who bought a garment from a jobber or manufacturer which was labeled 'merino,' that he did not expect to get a garment which was a mixture of wool and cotton? A. Yes, sir."

Mr. Ambrose Reeder Swan, at folio 554, testified:

"A. I do not consider that I was the proper man for the Government or anyone else to examine."

(This witness was the relative of one of the agents of the Trade Commission, preparing its case!)

Mr. Edgar Charles Kaufman, at folio 563, testified:

“Q. What, in your understanding as a merchant, does ‘merino’ mean as applied to underwear? A. Wool.

Q. All wool or a part wool? A. Well, I should think a part wool.”

Mr. Edgar Charles Kaufman, at folio 573, testified:

“Q. Mr. Kaufman, as I understand you, so far as your knowledge is concerned, in dealing with underwear, when a garment is marked ‘merino’ you know it as a garment which is a mixture of wool and cotton? A. Yes, sir.”

The same witness, at folio 575, testified:

“Q. As a matter of fact, Mr. Kaufman, your expressions of opinion here this morning are really surmise and speculation, are they not, so far as concerns the opinions that individual people may have about these matters? A. Yes.”

Mr. Richard S. Jackson, at folio 689, testified:

“A. And in my experience I have found that people don’t generally know what merino means. I have asked people what is your idea of merino? ‘Wool and cotton, I guess.’ I don’t even find people saying wool.

Q. Have you ever heard any one of the buying public say that it was all wool? A. No, sir.

*Cross Examination by Mr. Molloy:*

Q. When the word merino is used in connection with underwear, when underwear is described as merino underwear, you understand that to mean underwear made of a mixture of cotton and wool? A. I know that that is the general understanding of that, but personally I know that is not the case except in an individual case, but if I saw something advertised as merino underwear, I should judge that it was a mixture of cotton and wool, because most of the announcements are such; but speaking of myself personally, I would not advertise it as merino underwear."

The same witness, at folio 694, testified:

"Q. Let me ask, Mr. Jackson, from your knowledge of the retail trade covering underwear, is it or is it not your opinion that the term merino displayed on boxes on the shelves of retailers may lend itself to misrepresentation by the retailers of the quality of those goods in respect to their wool or cotton content? A. No, sir; I don't think so."

At folio 720, Mr. Lincoln Cromwell testified:

"Q. I ask you, from your experience of 30 years and more in this industry, Mr. Cromwell, whether it is not a fact that for the past 20 years it has been the general custom and practice in the underwear business to label and brand underwear as natural merino, wool, natural wool, natural worsted, and Australian wool, when, in fact, such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States; that there are a few manufacturers of underwear whose products are composed wholly of wool, and

are branded and labeled by them as such?  
A. That is correct."

Mr. Harvey O. Lloyd, at folio 731, testified:

"Q. And during the 25 years of your employment in the appraiser's office, is it not a fact, Mr. Lloyd, that an underwear garment composed partly of wool and partly of cotton has been known as merino underwear? A. The term merino was applied almost strictly to goods of English manufacture where the wool and cotton was combed in the yarn, and there was woollen underwear where it was made thread and thread, one thread of wool and two of cotton, or *vice versa*, which was termed wool and cotton.

Q. But it is a fact that the garments imported that did contain part wool and part cotton was known during your experience as merino? A. As I say, when the two substances were combined in the one yarn of which the garment was made.

A. A plaited garment is applied mostly to hosiery where the wool was thrown to the surface in the knitting and the cotton thrown to the back. There were two yarns.

Q. And these were called wool and cotton as distinguished from the garments that were made of a yarn which consisted of a mixed yarn? A. Yes.

Q. And that was known as merino? A. Yes; I might be more specific there. Merino importations were confined almost strictly to those from England. Wool and cotton, some few shipments came that were from England in the men's goods. I think the term merino was used on importations of women's goods from Switzerland, where wool and cotton were separated in the yarn, the term merino was applied there.

Q. Mr. Lloyd, are you familiar with the way the merchandise was marked and labeled? A. In a general way, yes.

Q. And in the garments that came under your observation that were all wool, is it not a fact that the label or brand indicated that they were all-wool garments? A. Very few if any of the merchandise itself was marked. The mark would be on the carton, or occasionally on the tag. The terms we used were cotton, merino, and wool and cotton on the carton.

Q. On the card? A. On the cartons, the labels on the boxes.

Q. And where they contained an all-wool fabric they were so marked all wool? A. They were marked all wool.

Q. All wool? A. Well, I won't be sure on that point.

Q. They were not marked merino, were they? A. When they were merino, yes.

Q. I mean, when they contained all wool they were not marked merino? A. No."

Mr. N. B. Brooks, at folio 749, testified:

"Q. How long have you been a spinner? Connected with this industry of spinning? A. Since 1889.

Q. What is a worsted merino yarn? A. A worsted merino yarn is a yarn composed partly of worsted yarn made of combed wool and cotton fibres made from combed cotton.

Q. Is it a term that has been used in the industry as long as you can remember? A. Merino has been used in the industry for over thirty-three years to my positive knowledge.

Q. I mean the term worsted merino yarn has been used as long as you have had anything to do with it? A. It has.

Q. Probably before? A. Probably before.

Q. So that a garment marked worsted merino is a garment that is fully in accord with definitions and terms used in your industry for many years? A. It is."

At folio 751:

"Q. I want to see if it is not exactly the fact that the term worsted merino yarn has been used for generations to define a yarn made of cotton and wool in varying percentages? A. Unquestionably to my personal knowledge for 33 years.

Q. So that a garment sold under that term—you would not say was sold under misleading label, would you? A. Not to me or to anyone who is conversant with the word 'merino' as used in the trade. To the general public it might be."

The same witness, at folio 759, testified:

"Q. On that opinion of yours, just one minute. To define a garment as cotton and wool means very little to the public, unless you define the percentage, isn't that so? A. I should say so.

Q. The same element of possible deception and fraud upon the public, if any, would arise from simply marking a garment cotton and wool as it would worsted merino? A. That is so."

Mr. Walter D. Larselere, at folio 771, testified:

"Q. You know what the word 'merino' means? A. No; I don't. I understand that it means one thing in the trade, definitely. Well, the word merino means fine wool and nothing else, as comparable to a fine cashmere, for example, but it so happens that the word merino has been used in compositions of cotton and wool, certainly all the time I have been in the business, which is twenty-eight years, and it must have gone on a long time before that.

Q. You mean so used in the trade? A. So used in the trade.

Q. I am speaking of the presentation of garments to the purchaser—to the average man—an unintelligent man. Do you see any object to garments made of cotton and wool being labeled specifically to that effect? A. As merino?

Q. Instead of merino. A. That's a pretty hard question to answer.

Q. You have stated that the term 'merino' has a special meaning in the trade; that, primarily, it means a fine wool, but that in the trade it means mixed cotton and wool. Am I correct so far? A. You are correct.

Q. You know, too, don't you, that manufacturers of underwear do put the term 'merino' on the manufactured article as a label? A. Yes.

Q. What I am trying to get at is whether in your observation that term 'merino' as applied to the product may deceive the average purchaser of underwear. A. It does not deceive the jobber or retailer."

Mr. George E. Miller, at folio 829, testified:

"Q. Is it not a fact that in the knit-goods industry that worsted merino has been used for a yarn which is composed of cotton and wool? A. Absolutely true.

Q. Yes; that has been the universal practice and definition in your industry all the time you have been in it? A. That is true."

At folio 830:

"Q. Do you manufacture garments—underwear garments—composed of cotton and wool? A. Yes.

Q. And in the trade garments so manufactured of cotton and wool have been known as merino, have they not? A. Yes.

Q. And that has been universally so for many years? A. Universally so."

Mr. William M. Stewart, of the Census Bureau, at folio 837, testified:

"Q. In preparing the divisions under which merchandise should be tabulated under this Table 21 referring to underwear there was not any question at all as you found in the industry, as to the use of this term 'merino' to define a certain class of underwear? A. No, I recall no misunderstanding in that respect.

Q. That was a term which you found in use as a census man was universally employed to define a garment which was a combination of wool and cotton? A. So generally employed and accepted; yes."

At folio 839:

"Q. Well, in the industry, at least in the year 1914, it was customary to consider, or to denominate garments which were not all wool as woollen or worsted, was it not? A. I am not aware of that, but the object of the census was to have a man report wool garments when they were composed of wool, and cotton when composed of cotton, and merino when composed of both wool and cotton, and we endeavored to hew very close to that terminology."

Mr. A. T. Skerry, at folio 864, testified:

"Q. And when you say that as applied to underwear it means a garment made of a percentage of wool and a percentage of cotton. Does not the result of your acquaintance with the trade use of that term influence your answer? A. Yes. *There is no pure merino wool underwear made.* You couldn't launder it but once and wear it. It would not be practical."

At folio 866:

"Q. Is it purely a description of the highest grade of wool yarn? A. The term



'merino' as applied to yarn would indicate that it is a percentage of cotton and wool.

Q. Is it not a fact that in the making of worsted yarns cotton is used in the making of a worsted yarn? A. On the French system, yes.

Q. So that there is bought and sold—manufactured and sold—in the trade a yarn known as worsted yarn that has a percentage of cotton in it? A. Yes."

Mr. Charles L. Mitchell, at folio 872, testified:

"Q. Prior to the word of the Federal Trade Commission that certain labels should not be used, you had, in your business, like other manufacturers, employed many of the terms that had been so condemned by the Trade Commission? A. We certainly did.

Q. In the knit goods industry, among the manufacturers, the jobbers, and the persons who purchased from you as a manufacturer, there never had been any question whatsoever about those terms, had there? A. No, sir.

Q. And when the Trade Commission spoke, why, you heard and you obeyed? A. Absolutely right."

(2)

*Testimony from the So-called General Public.*

During the course of the hearing the Commission sent out on two occasions a questionnaire to persons whose names were selected by the New York and Washington offices of the Commission. So far as the term 'merino' is involved it appears that from this selected list about 33 1/3% in one case and 35% in the other responded that "merino" meant cotton and wool mixed. *The counsel for the Commission then produced on the*

*hearings only those who had responded that "merino" meant "all wool."* This statement would be expanded beyond reasonable length if all of these were quoted. A few, however, are suggestive.

Mrs. Abernethy, who "patriotically" allowed her daughter to fill in the questionnaire "to help the government," had neither bought or used woolen underwear for 15 or 20 years (fols. 598, 601).

Mrs. Adams looked in a dictionary to get her definition. Had she looked in Webster's New International she would have found that "merino" was defined as a mixture of wool and cotton (fol. 603).

Louis Ettlinger, who fortified himself by looking in the Encyclopedia Britannica, apparently did not look far enough for there he would have found the statement: "In the hosiery and remanufactured materials trade the term merino is applied to fiber mixtures of cotton and wool in contradistinction to all-wool goods" (fol. 673).

And so it went. Probably sufficient is said when it is stated that this result at most is typical of any conclusion drawn when a body of people, students or the general public is examined upon a list of terms, historical events, names, etc. The inaccuracy of answers cannot establish that recognized definitions, facts, etc., are untrue. Error cannot be predicated upon the ignorance of the answerer of the question.

All of this testimony was utterly irrelevant. It came from those with whom the respondent had no dealings whatsoever. *The respondent only*

*dealt with the underwear trade, all of whom recognized and used the same terms as it did.*

(3)

*Definitions, Etc.*

The definitions found in standard and trade dictionaries and in encyclopedias, many of which contained the definition of "merino" as employed by the Winsted Hosiery Company, were introduced. And proof was taken to show that the term "merino" *in the wool market* is used to designate a fine grade of wool and that there is a considerable number of sheep in the United States of the breed of "merinos," a stock which originally came from Spain. The subject of definitions is considered in the points which follow.

Before proceeding to a discussion of the law of the case, attention is called to the alleged proof obtained practically by duress and "suggestion" while the hearings were continuing.

During the progress of the hearings the counsel for the Commission sought to develop the fact that manufacturers had discontinued the use of the word "merino" to mark a cotton and wool garment. In almost every instance it appeared that this was due to the ruling which had been made in this and similar cases and that the witness's concern had so acted lest it get into trouble with the Commission. Not content with this testimony it sought to improve its case by having associations take action *and then offered such resolutions as proof*. Under the urging and solicitation of the Commission, the National Association of Retail Clothiers acted by its directorate. The following letter was then submitted in proof:

“Chicago, Ill.  
November 18th, 1920.

Federal Trade Commission,  
1100 Browning Building,  
14 West Washington Street,  
Chicago, Illinois.

Gentlemen:

*At the suggestion of a representative of your office, we yesterday brought to the attention of the Board of Directors of our Association, who were in session here, the investigation which is being conducted by the Federal Trade Commission regarding the use of certain brands on knitted underwear which was not of pure wool, and which terms might be construed as misleading. The definite terms specified, we understand, were the following: (1) ‘Natural Merino’ (2) ‘Gray Wool’ (3) ‘Natural Wool’ (4) ‘Natural Worsted’ (5) ‘Australian Wool.’*

The following is quoted from the minutes of that meeting, approved by the Board of Directors:

‘It is the sense of the Board of Directors of the National Association of Retail Clothiers that the terms (1) “Natural Merino” (2) “Gray Wool” (3) “Natural Wool” (4) “Natural Worsted” (5) “Australian Wool” used as a brand or name on underwear that contained cotton or other adulterant than wool or on the box containing such underwear might mislead the consumer and in many instances retailers into the belief that garments so marked were not adulterated and that such misleading terms should not be used.’

*It is at the suggestion of this same representative of your body that we are forwarding the above information to you.*

Very truly yours,

NATIONAL ASSOCIATION OF  
RETAIL CLOTHIERS

(sgd.) CHAS. E. WRY,  
Secretary."

(p. 355).

Meantime the Commission had brought the pressure of its strong arm to bear upon the Knit Goods Manufacturers of America and on November 18th, 1920, had secured the passage of the following resolution, which was offered in support of the Commission's case:

"Use of words Woolen and Merino Resolutions adopted by the Knit Goods Manufacturers of America, November 18, 1920.

"WHEREAS, the label report adopted by this Association in November, 1919, permitted the words 'woolen' and 'merino' to be used on labels covering knit goods made partly of wool and partly of cotton, and

"WHEREAS, such use of these words has been criticized before the Federal Trade Commission as tending to deceive retail salesmen or consumers into thinking the fabric all wool when in fact it may be chiefly cotton, and therefore be it

"RESOLVED, that this Association request all its members to discontinue the words 'Woolen' and 'merino' on their labels and stamps, unless followed by the words 'wool and cotton,' and

"RESOLVED, that a copy of this resolution be filed with the Federal Trade Commission with a statement that the words 'woolen' and 'Merino' have never to our knowledge been used in unfair competition, and that this action is taken only because

we are informed that in parts of the United States remote from the manufacturing districts these words mean all wool or merino quality of wool, and because this Association is anxious to avoid all chance of deception in the sale of its products to the consumer" (p. 411).

*There is not a syllable of testimony in the case to show that the term "merino" has ever been used by manufacturers, jobbers or retailers to brand or mark an underwear garment which was all wool. There never has been such a thing as a "merino" all wool garment. On the contrary the testimony shows that practically universally all wool garments have been specifically marked "all wool" or "guaranteed" or "warranted all wool."*

The voluminous testimony taken has added little or nothing to the original statement of facts. What it has shown almost to a certainty is that the original stipulation of facts was an accurate presentation of the facts but certainly not one which would sustain the findings and order of the Commission.

## ARGUMENT

### POINT I

**Findings of fact, which are the basis of the conclusion of law of the Commission, are not supported by the evidence in some instances and in others omit vital matters contained in its proof, which the Commission conveniently seeks to ignore.**

(1)

The Commission's tenth finding of fact (fol. 92) *in so far as it bears upon the subject of knit underwear, which is the commodity involved in this case, is unfair and dishonest.*

"Paragraph ten. The word 'merino' means primarily and popularly a breed of sheep whose fleece is a fine long-staple wool, and as applied to wool it signifies the fleece of that sheep or a grade corresponding to it in quality. It is so used commercially in the wool trade and commands the highest price. \* \* \*"

"Merino", as applied to underwear has for more than half a century meant a combination of cotton and wool.

Scores of witnesses called by the Commission testified to that effect. Even the selected result of the Commission's questionnaire added great numbers to the same effect.

Webster's New International Dictionary gives as one of the definitions of "merino":

"Merino \* \* \* A fine fabric made originally of merino wool but later a fine wool mixed with cotton."

Murray's New English Dictionary defines "merino" as follows:

"Merino \* \* \* A soft wool material resembling, but finer than, French cashmere, originally manufactured of merino wool, but later of a fine wool mixed with cotton (Citing [1869] E. A. Parker Pract. Hygiene 405. 'In merino and other fabrics it [cotton] is used with wool')."

(Cole's Dictionary of Dry Goods (1892):

"Merino is also a term applied to a variety of medium weight, soft finished knitted underwear, formerly made of merino wool, but now of cotton and wool mixed."

Encyclopedia Britannica, Eleventh Edition:

"In the hosiery and remanufactured materials trade the term merino is applied to fiber mixtures of cotton and wool in contradistinction to all-wool goods."

By what course of reasoning, let alone with any sense of justice and fairness, can the Commission shut its eyes to these standard definitions and insist that the only definition which it will accept as a fact in this case is that "merino" means "a sheep" or "wool"?

With just about the same propriety it could say,—we find that "court" means "an inclosure" but not "a hall where justice is administered."

There has never been any question by other departments and bureaus of the Federal Government that "merino" meant and means just what this petitioner, together with all other manufacturers held it out to be, a mixture of cotton and wool.



Treasury Decision No. 10736 is an opinion by General Appraiser at New York in 1891. We find therein the following:

“The following phrases have been held by the courts to have a commercial designation among traders and importers sufficient to fix their classification specifically as belonging to a named class of merchandise: \* \* \* ‘Merino goods’ (*Greenleaf vs. Worthington*, 26 Fed. Rep. 303).”

We quote the opinion of Judge Colt in the *Greenleaf* case:

“Under the agreed statement of facts it appears that the importations were known in trade in 1874 as merino shirts, drawers, socks, and stockings, and that the yarn was known in trade as merino yarn, and that this yarn was produced by carding together wool and cotton, and spinning, by which process a distinct article of commerce from either wool or cotton is produced, *which is known and described as merino*. The importations being composed in part of wool and in part of cotton, and *known commercially as ‘merino,’* we do not think they should be assessed under Section 2504, Schedule L, of the Revised Statutes, but that they clearly come under Section 2504, Schedule M, of the revised Statutes, amended August 7, 1882 (22 St. 301), and are liable to an assessment of 35 per cent, *ad valorem*.”

The Department of Commerce in its publications has recognized the universal application of the word “merino” in the same sense in which it has been used by the petitioner.

Giving the statistics of the Knit Underwear industry, it says:

“Of the total value of the shirts and drawers produced in 1999, those made of all cotton amounted to \$50,007,589 or 71.86 per cent; *merino* or mixed \$17,055,624 or 24.51 per cent; all wool \$1,820,521 or 2.61 per cent.” The Knit Underwear Industry, page 16, Miscellaneous Series No. 32, Department of Commerce (Bureau of Foreign and Domestic Commerce).

Recognition of the same general use of the word “*merino*” will be found at page 205 of the same pamphlet.

The same department of the Government in its publication covering the hosiery industry in tabulating the quantity and value of hosiery and knit goods produced in 1899, 1904 and 1909, divides the same into three classes: cotton, *merino* or mixed (wool and cotton), and woolen.

The Hosiery Industry, page 14, Table 5, Miscellaneous Series No. 31 (Bureau of Foreign and Domestic Commerce).

Similar references will be found at pages 15 and 16 of the same pamphlet.

The same department in its Census of Manufacturers, 1914, Hosiery and Knit Goods, page 14, classifies the materials used as cotton yarn, woolen yarn, worsted yarn, *merino* yarn and silk yarn.

The Thirteenth Census of the United States (1910), Volume X, page 79, in its statistics for the Hosiery and Knit Goods Industry classifies the materials used as cotton yarn, woolen yarn, worsted yarn and “*merino* (cotton mixed) yarn.”

In the face of these undisputable facts, deliberately and purposely omitted and overlooked by

the Commission, this Court, as did the court below, will not sustain the action of the Commission.

(2)

The Fourth Paragraph of the findings of fact that

“The methods employed by the respondent in labelling, advertising and branding its product are effective to carry both to the retailer and the ultimate consumer thereof, the representation that such garments were composed wholly of wool, and in the absence of technical knowledge in either the retailer or the consumer tended to create the belief that such garments were in fact wholly composed of wool”

is not supported by the facts. (a) With hardly an exception every retailer examined by the Commission testified to the fact that “merino” meant a mixture of wool and cotton. Almost the only exception was the brother-in-law of the employee of the Federal Trade Commission gathering proof to sustain its findings. The overwhelming proof in the case is that retailers have used for years and years and for the same period have known that “merino” as applied to underwear means *one* thing and that, a cotton and wool mixture. Standard dictionaries as well as trade dictionaries so define the term. It is, therefore, a mischievous and untrue finding to speak alone of technical knowledge. 33 1/3% of the selected persons, called presumably from the public at large by the Commission, defined “merino” as a cotton and wool mixture. What basis is there for saying that their knowledge is technical knowledge?

There is nothing in the case which can in any fairness sustain a finding that as to a *retailer*, the

term "merino" was effective to carrying the representation that the garment was all wool.

In Paragraph Twenty of the findings of fact (fol. 94) the Commission finds:

"The word 'Merino' is used by manufacturers of yarn and knit underwear and largely by jobbers and retailers as a trade term meaning a combination of cotton and wool."

The Commission in another finding states that such retailers are "ignorant." (Finding number fifteen.) If there be such retailers, certainly this last statement is the undisputed fact, and the finding that the use of the term "merino" is effective to create misrepresentation among retailers is as unwarranted in law as it is in morals.

(b) To the same degree such a finding is unwarranted as to the ultimate consumer, *with whom it must be remembered this petitioner had no dealings*. The record shows that of the selected public to whom the Commission appealed and many of whom never bought or used any kind of woolen underwear, 33 1/3% had no such idea of the term "merino" as the Commission insists *only* exists among the public, to wit, "all wool". Yet with a fine disregard of the proof adduced by itself the Commission makes the arbitrary finding objected to.

We imagine that with unlimited funds and sweeping examinations it will always be possible to produce some evidence to establish some alleged item in any case. You can always find ignorance even if you cannot find wisdom. So in the proceeding at bar amid the abundance of proof *all adduced by the Commission*, supporting

the petitioner, there is found a statement here and there which standing alone might serve as a peg upon which the Commission may hang a finding.

But the Commission cannot ignore a matter which is vital to the determination of the issue. The power of the reviewing court is, we believe, accurately set forth in

*Curtis Publishing Co. vs. Fed. Trade Commission*, 270 Fed. Rep. 881.

In that case the Court said (p. 911):

"Now, it is very apparent that where the supervisory review by the Circuit Court of Appeals which Congress invoked, provided that that Court 'shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree, that it is the province and indeed the duty of the reviewing court, to consider not merely the findings of the Commission but the whole record, the whole proofs and the whole proceeding, and to say first, whether in view of all the proofs, the limited facts found by the Commission really passed on the pertinent and decisive facts, and so warranted an injunction; and second, if such limited facts do not reach the merits and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then since Congress has enacted that the Circuit Courts shall make and enter upon the pleadings, testimony and proceedings set forth in such transcript, a decree affirming, modifying or setting aside the order of the Commission,' it is quite clear that it is not only the province but the duty of the Circuit Court of Appeals and indeed the expressed purpose of Congress that such re-

viewing Court should itself examine the pleadings the entire testimony and proceedings, and upon such inclusive examination, determining whether the facts found by the Commission and the proofs on which the Commission made no findings and which the Court, in the absence of such finding, itself finds and determines, legally established a case of unfair business competition by the Curtis Company."

## POINT II

**The conclusion of law is in direct conflict with the findings of fact and the facts.**

The conclusion of the Commission is that "the practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are *unfair methods of competition*."

The respondent is a knit underwear manufacturer, with its principal factory and branches in Connecticut (Findings of Fact, Paragraph One). *It sells and ships its product to retailers throughout the United States (Findings of Fact, Paragraphs Two and Eight). It uses labels containing the word "merino" on its boxes but not on its garments, where the garment so sold is not composed wholly of wool but is part wool and part cotton (Findings of Fact, Paragraphs Four, Five and Six). "The word 'merino' is used by manufacturers of yarn and knit underwear and generally by jobbers and retailers as a trade term meaning a combination of cotton and wool"* (Finding of Fact, Paragraph Nineteen).

The Commission has therefore found as a fact that in the industry in which the respondent must find its competitors and among those to whom it sells its product, "merino", means and is used to define a garment made of cotton and wool. In so labeling its product, there is no fraud, no deception and absolutely nothing unfair. When a term is used, which is general in its use, which is generally used by manufacturers, jobbers and retailers in the knitwear industry, to describe

exactly the kind of garment which the respondent makes, wherein lies the unfair method of competition?

Not very ingeniously but determinedly to break this respondent to its will, the Commission tries to weaken this conclusion which it successfully established for the respondent in its examination day after day of great numbers of manufacturers, jobbers and retailers, by introducing irrelevant evidence and findings:

1. That a part of the public understands "merino" as applied to underwear to indicate an all wool garment.

2. That the label "merino" "tends to encourage and aid representations to consumers by *ignorant or unscrupulous retailers and salesmen* that the underwear so labeled is all wool."

3. That since the institution of these proceedings, two associations of manufacturers and retailers have recommended the discontinuance of the use of the word "merino" as heretofore used by them. (Action in both cases was taken while the testimony was being taken under order of this Court; by the American Knit Goods Manufacturers under the direct club of the Commission and by the board of directors of the National Association of Retail Clothiers upon the "*suggestion*" of the representative of the Trade Commission.

4. That some buyers for retailers and sales people understand the word "merino" as applied to underwear to indicate all-wool underwear. (About the only testimony of this character came from the relative of a Federal Trade employee who was engaged in "working up" this case and



from the secretary of the Consumers League of Washington, D. C., a young woman whose bias and unreliability is shown from a most casual examination of her testimony).

We consider them in their order

(1) That a part of the purchasing public misunderstands the term "merino."

The respondent and its competitors sell to retailers and jobbers. It is not engaged in competition in selling to the purchasing public—its field of operation is that of jobbers and retailers. They, according to Commission's finding, "generally" used the term "merino" just as does this respondent.

But further, can this respondent be penalized and condemned for the ignorance of those whom the Commission has discovered?

Webster's New International Dictionary in defining the term "Merino" says:

"Merino \* \* \* A fine fabric made originally of merino wool but later a fine wool mixed with cotton."

Murray's New English Dictionary, probably the greatest and most authoritative in the English language says:

"Merino \* \* \* A soft wool material \* \* \* originally manufactured of merino wool, but later of a fine wool mixed with cotton."

Of course, with its characteristic fairness (?) in this case, the Commission calmly ignores this evidence but this Court will not.

This respondent was therefore using the term "merino" in accordance with correct usage and definition.

How this "ignorant" public got its idea is suggested by the witness, who looked in *a* dictionary (p. 494). Had she looked in Webster she would not have been numbered with the ignorant.

Also the witness Mrs. Abernethy, who "patriotically" allowed her daughter to fill in the questionnaire "to help the government" (p. 488).

Wherein lies the authority of the Commission to make this respondent meet the ignorance of a portion of the public? What in the statute creating it gives the Commission any such power?

(2) That the label "merino" tends to encourage and aid representations to consumers by *ignorant* or *unscrupulous* retailers and salesmen.

What authority has the Commission to brand this respondent as engaging in an unfair method of competition because of the *ignorance* of a salesman or the *dishonesty* of a tradesman?

What unfair method of competition of this respondent is involved in any such alleged practice?

The Commission finds that those to whom this respondent sells and its competitors generally use this same term. It is there and among them alone that there can be competition. And the practice cannot be unfair. Its own witnesses have specifically stated that it is *not* unfair (p. 655).

(3) As to the resolutions of the American Knit Goods Manufacturers and the National Association of Retail Clothiers.

We said in opposing the taking of testimony when application was made to the Circuit Court of Appeals:

“The Commission intends if possible to prevent a review of the facts and findings upon which it has acted and make a new case after it has harassed an industry and hopefully expects it has got that industry in a frame of mind where it will acquiesce in everything the Commission demands.”

Prophecy was fulfilled in fact. Having made its decree in this and a score of similar cases, the Commission employed its fiat to compel manufacturers to acquiesce in its terms and now wishes this Court to take that acquiescence as *proof* that it was right. When all the power of a great arm of the Government can be thus employed and the result taken as judicial proof we shall have arrived at the stage when lifting one's self by his boot straps will be regarded as possible.

The respondent must stand or fall on the facts as they were when the Federal Trade Commission turned its guns upon this respondent. This Court certainly will not permit the Commission to build up a case by duress.

(4) That some buyers for retailers and sales people understand “merino” as applied to underwear to indicate all wool.

As indicated in Paragraph Fifteenth of its findings, the Commission describes such retailers and salesmen as “*unscrupulous*” or *ignorant*.”

Here again the question is—Shall the manufacturer be penalized for such ignorance? Trade dictionaries without exception, general dictionaries of the highest standing, the overwhelming testimony in this case produced by the Commis-

son, Government departments (Census compilations and Treasury decisions), all recognize "merino" as applied to knitwear as a mixture of cotton and wool. Is an entire industry to be revolutionized because of ignorance? But far and beyond this, the question at bar is, How does this create an unfair method of competition?

The Commission has apparently approached this case (assuming for the moment that there is some merit in its contention that "merino" must only mean "all wool," which it does not) under the delusion that it is operating under a statute identical with the pure food and drug act. That it does not is clearly shown in Point III of this brief.

In the first instance (on the stipulated facts) the Commission determined that "merino" as used in the knitgoods industry should be tabooed. Having apparently decided upon the facts as it agreed they were, that its order could not stand, it has proceeded to take testimony as permitted by this Court. Aside from the great mass of irrelevant and in many cases grossly unfair and improper testimony which it has rolled up after repeated hearings in New York and Washington, the facts are practically the same as those originally stipulated. The Commission's last state is no better than its first. The record will be searched in vain to find a single instance where an all wool underwear garment has ever been marked "merino." No one in the industry ever heard of any such garment. "Merino" has always been used in knit goods to define a mixture of cotton and wool.

But the Commission having once committed itself to the proposition that the industry should

not use the term "merino," as it had for half a century or more, has determined that by hook or crook it will cram its wish down the throat of this respondent. Its alleged reasons are far fetched and beyond its power and authority. Its findings and the facts show the impropriety of its order at every turn; but still it insists that respondents use of the term "merino" must cease. The Commission's attitude toward the use of the term "merino" is perhaps summarized by the nursery rhyme.

I do not like you, Doctor Fell,  
The reason why I cannot tell,  
But this I know full well  
I do not like you, Doctor Fell.

### POINT III

**The Federal Trade Commission is without jurisdiction over the facts of this case.**

So far as the Federal Trade Commission Act can be invoked in this proceeding, the material parts of Section 5 are as follows:

“Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

“Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint \* \* \*

We do not think any unprejudiced person can read the record in this case and justly say that the petitioner misbranded its product when it marked as “merino” garments composed of cotton and wool. (See preceding points). But assuming for the argument’s sake that it has, then under the facts as they are in this case, the statute under which the Federal Trade Commission

derives its power and authority has no application.

What the Federal Trade Commission has endeavored to do herein is to assume that the declared unlawful acts and prohibition set forth in the Act creating the Commission are the same as if the statute read "The introduction into interstate or foreign commerce of any article, either manufactured or raw product, which is adulterated or *misbranded*, is unlawful." As the Court will see at a glance the Commission by its order herein has assumed to declare that the unlawful act defined in the Federal Trade Commission Act, is the same as the unlawful act defined in the Pure Food and Drug Law, extended to any product. (June 30, 1906 c. 3915, sec. 2).

It does not require very sharp powers of analysis to show how erroneous such a contention is nor what a usurpation of jurisdiction and authority has been exercised by the Trade Commission.

The history of the making of the statute here involved is in itself a complete refutation of any such claim. The purpose behind the act was the regulation of competition.

The Senate Committee which reported the measure said:

"Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission.  
\* \* \* Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a neces-

sary adjunct to the preservation of competition and to the practical enforcement of the law \* \* \* The Commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea."

Report of Senate Committee on Interstate Commerce, June 13, 1914, Sixty-third Congress, Second Session, No. 597, p. 10.

And in the statute which was enacted Congress undertook to regulate competition through the Trade Commission.

It is "Unfair methods of Competition" that are declared unlawful.

This phrase has been interpreted and defined by the courts:

"The commissioners representing the government as *parens patriae*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure *competitors* directly or *through deception of purchasers*, quite irrespective of whether the specific practices in question have yet been denounced in common law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control."

*Sears, Roebuck & Co. vs. Federal Trade Commission*, 258 Fed., 407, 311.



"We think the unfair methods, though not restricted to such as violate the Anti-Trust Acts, must be at least such as are unfair to the public generally. It seems to us that section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts."

*Federal Trade Commission vs. Gratz*,  
258 Fed., 314, 317.

In the case of *Kinney-Rome Company vs. Fed. Trade Commission* (Seventh Circuit, September 8, 1921), there is an exhaustive grouping of cases in the discussion by the Appellate Court of this Term "unfair competition." We quote at length from the decision:

"(1) In *Federal Trade Commission vs. Gratz*, 253 U. S. 421 (page 562 herein), it is said:

'The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimate to determine as matter of law what they include.'

While the exact words 'unfair methods of competition' have not been frequently, if at all, used in the decisions, yet 'unfair competition' and 'unfair trade' have been repeatedly the subject of consideration and discussion by Federal and State courts, and several times in this Circuit.

In *Pillsbury vs. Pillsbury-Washburn, etc., Co.*, 64 Fed. 841, 845, this Court said:

'The right of appellees to relief is  
• • • rested upon principles applied

by courts of equity in cases analogous to cases of trade-marks, where the relief is afforded upon the ground of fraud.'

In *Cole vs. Am. Cement & Oil Co.*, 130 Fed. 703, it was stated by this Court:

'The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good will of a trade built up by his efforts, and sought to be taken from him by unfair methods.'

In *Goodyear, etc., Co. vs. Goodyear Rubber Co.*, 128 U. S. 598, it was said at p. 604:

'The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff.'

In *Howe Scale Co. vs. Wyckoff, etc.*, 198 U. S. 118, the Court stated:

'The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.'

In *International News Service vs. Asso. Press*, 248 U. S. 215, it was said at page 241:

'It is said that the elements of unfair competition are lacking because there is

no attempt by defendant to palm off its goods as those of complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. (Citing *Howe* case, *supra*.) But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as *quasi* property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.'

See, also:

*Keystone Type Foundry vs. Portland Pub. Co.*, 186 Fed. 690.

*Sterling Remedy Co. vs. Eureka Chem. & Mfg. Co.*, 80 Fed. 105.

*Rathbone, Sard & Co. vs. Champion Steel Range Co.*, 189 Fed. 26, 30.

*Bates Mfg. Co. vs. Bates, etc., Co.*, 172 Fed. 892.

*West Pub. Co. vs. Ed. Thompson Co.*, 169 Fed., 833.

*Manitowac Malting Co. vs. Milwaukee Malting Co.* (Wis.), 97 N. W. 389.

*Sarto vs. Schaden* (Iowa), 101 N. W. 511.

*Regent Shoe Mfg. Co. vs. Haaker* (Neb.), 106 N. W. 595.

*Rocky Mountain Bell Tel. Co. vs. Utah Independent Tel. Co.* (Utah), 88 Pac. 26.

*Bissell Chilled Plow Wks. vs. T. M. Bissell Plow Co.*, 121 Fed. 357.  
*Am. Brewing Co. vs. Bienville Brewery*, 153 Fed. 615.

There are many other cases in the Federal Courts which cite the Howe and Good-year cases.

(2) It is not conceived that Congress, which laid down no definition whatever, intended to either limit or extend the matters which constituted unfair methods of competition prior to the passage of the Clayton Act (*Curtis Pub. Co. vs. Federal Trade Com.*, 270 Fed., 881, 908 (page 598 herein), but that its object was the creation of a board of commissioners, who, as stated in the Sears, Roebuck case, 258 Fed. 307, 311 (page 524 herein):

'are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases.'

We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an 'unfair method of competition.'

First and foremost therefore there must be actual competition before there can be any unfair competition.

In the case at bar there is no competition in use of the word "merino." It has been used in

the knitgoods industry for more than half a century to define a fabric made of cotton and wool. It never has been used to define an all wool garment.

The manufacturers with whom this petitioner competes, the retailers, except a few "ignorant or unscrupulous" (such is the finding of the Commission), to whom this petitioner and its competitors sell—all use the term "merino" to define a mixture of cotton and wool. How, therefore, can any question of competition arise in the use of this term? No manufacturer, no jobber, practically no retailer (except the "ignorant and unscrupulous") ever meant anything else in using the term "merino" except a garment of cotton and wool.

In the case of *Federal Trade Commission vs. Anderson Gratz, et al.* (No. 492, October Term, 1919, June 7, 1920), Mr. Justice MacReynolds, delivering the opinion of the Supreme Court, said:

"The words 'unfair method of competition,' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Certainly a practice in the use of the term "Merino" universally followed for more than

50 years, recognized by the trade, by government departments and by the courts, cannot be stamped as an unfair method of competition. It cannot be stigmatized as opposed to good morals, because characterized by deception, bad faith, fraud or oppression, or as against public policy because of its dangerous tendency unduly to hinder competition or create monopoly. There has been and is no deception, no bad faith, no fraud, no oppression, no tendency to hinder competition nor create monopoly.

In the dissenting opinion in the Gratz case Mr. Justice Brandeis said:

“The task of the Commission was to protect competitive business from further inroads by monopoly. It was to be vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene.”

Says the Trade Commission in effect in this case:

“A portion of the public, the ultimate consumer, ignorantly or otherwise, thinks ‘merino’ upon boxes of underwear means that they are all wool. It matter not that those to whom you sell, the retailers, know that ‘merino’ means a mixture of cotton and wool, and that your competitors, the manufacturers, for 50 and more years have followed a general practice of so branding their goods; we believe you are guilty of *unfair* competition, because a portion of the public, although you do not sell to them direct, is *self deceived*. Therefore we forbid the use of the term.”

We submit that this is an arbitrary exercise of a power which is not given to the Commission. No question of unfair competition is involved. That was most forcibly brought out in the examination of Walter D. Larezlere, a large manufacturer of worsted yarns. He testified:

“Q. You don’t know any yarns which are known in the trade as worsted merino?

A. We don’t make them; we run up against them all the time, but we don’t make them ourselves.

Q. You say you run up against them; do you find yourself in competition with them?

A. Always. Not always, would qualify that; most of the time” (fol. 763).

Q. So you don’t know, at all, that there is an unfair competition of these merino worsteds with all wool yarns? A. An *unfair* competition?

Q. Unfair; yes. A. No” (fol. 770).

We are in perfect accord with the purposes of the statute involved herein and the manifest good which the Commission can do. But when it turns tyrant, persecutor as well as prosecutor, when instead of acting as *parens patriae* it acts as *inquisitor conscientiae*, then we believe that this court will intervene with its restraining hand. No question of competition, much less unfair competition, is involved, and consequently there is no power under the statute giving the Commission jurisdiction to issue any such order as it has made in this case.

While the foregoing argument has been based upon a consideration of the term “merino,” it applies with full force and effect to every term which the petitioner employed and which the Commission has condemned.

It is unfair methods of competition which alone permit the Commission to act.

To the trade to which this petitioner sold, among the manufacturers who were this petitioner's competitors, the terms employed had been used in the industry (Knitwear) for half a century with exactly the same meaning as that carried by the petitioner.

As Mr. Cromwell of William Iselin & Co., probably one of the most important men in the industry, said:

“Q. I ask you, from your experience of thirty years or more in this industry, Mr. Cromwell, whether it is not a fact that for the past twenty years it has been the general custom and practice in the underwear business to label and brand underwear as natural merino, wool, natural wool, natural worsted and Australian wool when in fact such underwear so described is not composed wholly of wool; that this custom and practice is general in the underwear trade throughout the United States that there are a few manufacturers of underwear whose products are composed wholly of wool and are branded and labeled by them as such? A. *That is correct*” (fol. 721).

That also was the originally stipulated fact.

When this petitioner was made a defendant in this proceeding the practice which the Commission condemns was one generally followed by those in the underwear business. No one with whom this petitioner dealt was deceived. No question of competition, certainly no unfair method of competition, was involved.

In two paragraphs, Judge Ward has stated in



the opinion of the court below, in the most succinct and convincing fashion, the complete answer to the Federal Trade Commission's action in this case:

"The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce, if so doing will be of interest to the public. And if such method of competition is prohibited by the act to issue an order requiring the person or corporation using it to cease and desist from doing so. We have heretofore so understood the extent of the Commission's authority in *Federal Trade Commission vs. Gratz*, 258 Fed. Rep. 314; affirmed 253 U. S. 421, and *New Jersey Asbestos Co. vs. Federal Trade Commission*, 264 Fed. Rep. 509.

In this case there was obviously no unfair method of competition as against other manufacturers of underwear. *The labels were thoroughly established and understood in the trade. There was no passing off of the petitioner's goods for those of other manufacturers. There was no combination in restraint of trade nor any attempt to establish a monopoly. Manifestly no other manufacturer of underwear could have maintained a suit against the petition for unfair competition or for an injunction or damages under the anti-trust acts. Assuming that some consumers are misled because they do not understand the trade signification of the labels or because some retailers deliberately deceive them as to its meaning the result is in no way connected with unfair competition, but is like any other misdescription or misbranding or products. Conscientious manufacturers may prefer not to use a label which is cap-*

able of misleading and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so" (fol. 917).

We repeat this is not a "pure products" statute and such is the character attempted to be given it by the Commission. Its powers are to suppress unfair competition, but unfair competition is not established by showing a partial ignorance on the part of the public, of trade custom, terms and definitions. It is upon this latter fallacy that the counsel for the Commission has built its case, with a superabundance of testimony and a dearth of supporting fact.

#### **POINT IV**

**The order of the Circuit Court of Appeals should be affirmed.**

Respectfully submitted,

HENRY P. MOLLOY,  
Attorney for Respondent.

HENRY P. MOLLOY,  
MELVILLE J. FRANCE,  
On the Brief.

FEDERAL TRADE COMMISSION v. WINSTED  
HOSIERY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

No. 333. Argued March 13, 14, 1922.—Decided April 24, 1922.

1. Findings of fact made by the Federal Trade Commission are conclusive when supported by evidence. P. 491.
2. A manufacturer's practice of selling underwear and other knit goods made partly of wool but labeled as "natural merino," "natural worsted", "natural wool" and with other like terms taken by a substantial part of the consuming public and sometimes in the retail trade as indicating pure wool fabrics, with the result of misleading part of the public into buying, as all-wool, garments made largely of cotton and of aiding and encouraging misrepresentations by unscrupulous retailers and their salesmen, is an unfair method of competition as against manufacturers of like garments made of wool or wool and cotton, who brand their products truthfully, and is subject to be suppressed under § 5 of the Federal Trade Commission Act. P. 491.
3. Such a method of competition, inherently unfair, does not cease to be so because competitors become aware of it or because it

becomes so well known to the trade that retailers, as distinguished from consumers, are no longer deceived by it. P. 493.  
272 Fed. 957, reversed.

CERTIORARI to review a decree of the Circuit Court of Appeals setting aside an order of the Federal Trade Commission under § 5 of the Act of September 26, 1914, c. 311, 38 Stat. 719.

*Mr. Solicitor General Beck*, with whom *Mr. W. H. Fuller*, *Mr. Adrien F. Busick* and *Mr. James T. Clark* were on the brief, for petitioner.

Both from the standard of general public morals and from the legal point of view, the practice of misbranding must be held to come within the category of acts "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud," etc. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427; *Curtis Publishing Co. v. Federal Trade Commission*, 270 Fed. 881, 908; *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307.

The legislative history of the Federal Trade Commission Act shows that it was the intention of Congress to make all unfair methods of competition unlawful, and to regulate competition rather than solely to prevent monopoly. The purpose to prevent unfair practices in trade enlarges the natural interpretation of "unfair methods of competition" to include whatever might be against the public interest as obstructing the channels of fair competition, on the preservation of which the policy of the Congress is firmly based.

The practice alleged in this proceeding has all the essential elements that make "passing off" or "unfair competition" an unfair method of competition.

The essential elements of unfair competition as known to the common law are deception of, or fraud on, the public and consequent injury to competitors. The cause

of action seems to be based primarily on the protection to be given to a producer's property right in a trade mark or name, or in the good will attached thereto, against one who simulates them so as to confuse the public and to pass off his goods for another's. It is essential, as the basis of the injury to the complainant, that the deception of the public, or the likelihood of such deception, be shown.

While in the form of the instant proceeding no individual producer is complainant, and no specific individual private injury to property right is set up, such injuries to competitors of the respondent collectively who do not misrepresent follow inevitably from the misrepresentation of respondent's labels. The practices complained of affect a class of competitors and not an individual competitor, whose trade mark or name or product is simulated.

In a proper case of unfair competition, or passing off, at common law, the public is involved, and its deception is essential to the action. The two cases involve the same elements, viz, misrepresentation and deception of the public and consequent injury to a competitor or competitors.

The manufacturer is responsible to the public. Deception of the dealer is immaterial. The deceptive character of the label being granted, its natural and reasonable effect will be presumed, and it is not necessary to show actual collusion of the manufacturer with the retailer to deceive the public. *Nims*, Unfair Competition, § 381, and authorities cited; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 155; *Fuller v. Huff*, 211 Fed. 610; *Scriven v. North*, 134 Fed. 366, 375; *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 722, 723; *Rubber Co. v. Devoe & Reynolds Co.*, 233 Fed. 150, 157; 38 Cyc. 778; *Fairbanks Co. v. Bell Mfg. Co.*, 77 Fed. 868, 878; *Estes & Sons v. Frost Co.*, 176 Fed. 338, 340.

Only ordinary purchasers, including the unwary and ignorant, need be misled. *Bissell Chilled Plow Works v. Bissell Plow Co.*, 121 Fed. 357, 366. See also *Notaseme Hosiery Co. v. Straus*, 201 Fed. 99, 100; *Photo-Play Publishing Co. v. La Verne Publishing Co.*, 269 Fed. 730; *Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. 603, 610; *Winterton Gum Co. v. Autosales Gum Co.*, 211 Fed. 612, 617; *Royal Baking Powder Co. v. Donohue*, 265 Fed. 406; *Houston v. St. Louis Packing Co.*, 249 U. S. 479; *Thum Co. v. Dickinson*, 245 Fed. 609, 613.

The probable effect, not the intention, governs. It is a question of preventing, by the Commission's order, practices or methods which may in reason cause the results of unfair competition, before the effects are realized, and it is not necessary to show the accomplished fact of unfair competition. *Beech-Nut Co. v. Federal Trade Commission*, 264 Fed. 885, 890; *Federal Trade Commission v. Gratz*, 258 Fed. 314, 317; *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 311.

Proof of actual intention to deceive is not essential. *Rubber Co. v. Devoe & Reynolds Co.*, 233 Fed. 150, 157; *Van Houten v. Hooton Co.*, 130 Fed. 600; *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 413. This is the law in England. Kerly on Trade Marks, p. 482; *Cary Sons v. Crisp*, 19 R. P. C. 497; *Birmingham Small Arms Co. v. Webb*, 24 R. P. C. 27; *Powell v. Birmingham Vinegar Co.*, 2 Ch. 54.

Actual deception or damage need not be shown. *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307; *National Harness Manufacturers Assn. v. Federal Trade Commission*, 268 Fed. 705, 713; *Beech-Nut Packing Co. v. Federal Trade Commission*, 264 Fed. 885, 890; *Notaseme Hosiery Co. v. Straus*, 201 Fed. 99, 100; *Rubber Co. v. Devoe & Reynolds Co.*, 233 Fed. 150, 156; *International Silver Co. v. Rogers Corporation*, 66 N. J. Eq. 129; 38 Cyc. 775-777, 780.

The history of the law of unfair competition shows a steady broadening from the protection of the exclusive property right in a trade mark to the protection of the good will in a name against those who seek by borrowing the name to which it is attached to use it for themselves to the loss of the original user. As this development of the law has progressed, the importance of the element of the public's interest in not being imposed upon has increased as that of the individual who invokes the court's action has receded. *Estes & Sons v. Frost Co.*, 176 Fed. 338; *Trinidad Asphalt Co. v. Standard Paint Co.*, 163 Fed. 977, 980, affd. 220 U. S. 446; *Pillsbury-Washburn Flour Mills v. Eagle*, 86 Fed. 608; *Kinney v. Basch*, 16 Am. Law Reg. (N. S.) 596.

Misbranding is a defense, as a fraud on the public. *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 528; *Church v. Proctor*, 66 Fed. 240.

The public is entitled to know what it gets. *Pillsbury v. Pillsbury-Washburn Flour Mills*, 64 Fed. 841, 848; *Prince Mfg. Co. v. Prince Metallic Paint Co.*, 135 N. Y. 24, cited with approval in *Worden v. California Fig Syrup Co.*, *supra*.

Inveteracy of fraudulent practice is only an aggravation.

*Mr. Melville J. France*, with whom *Mr. Henry P. Moll*oy was on the brief, for respondent.

Findings of fact, which are the basis of the conclusion of law of the Commission, are not supported by the evidence in some instances and in others omit vital matters contained in its proof, which the Commission conveniently seeks to ignore.

"Merino", as applied to underwear, has for more than half a century meant a combination of cotton and wool. Webster's New International Dictionary; Murray's New English Dictionary; Cole's Dictionary of Dry Goods (1892); Encyclopedia Britannica, 11th ed.; Treas. Dec.

No. 10736; *Greenleaf v. Worthington*, 26 Fed. 303; The Knit Underwear Industry, p. 16, Miscellaneous Series No. 32, Department of Commerce, Bureau of Foreign and Domestic Commerce; The Hosiery Industry, p. 14, Table 5, Miscellaneous Series No. 31, Bureau of Foreign and Domestic Commerce; Thirteenth Census, 1910, Vol. X, p. 79.

There is nothing in the case which can in any fairness sustain a finding that, as to a retailer, the term "merino" carried the representation that the garment was all wool.

To the same degree such a finding is unwarranted as to the ultimate consumer, with whom it must be remembered this petitioner had no dealings.

The Commission cannot ignore a matter which is vital to the determination of the issue. *Curtis Publishing Co. v. Federal Trade Commission*, 270 Fed. 881, 911.

The Commission found that the respondent is a knit underwear manufacturer; that it sells and ships its product to retailers throughout the United States and uses labels containing the word "merino" on its boxes but not on its garments, where the garment so sold is not composed wholly of wool but is part wool and part cotton; and that the word "merino" is used by manufacturers of yarn and knit underwear and generally by jobbers and retailers as a trade term meaning a combination of cotton and wool.

The Commission has therefore found as a fact that in the industry in which the respondent must find its competitors and among those to whom it sells its product, "merino" means and is used to define a garment made of cotton and wool. In so labeling its product, there is no fraud, no deception and absolutely nothing unfair. When a term is used, which is general in its use, which is generally used by manufacturers, jobbers and retailers in the knitwear industry, to describe exactly the kind of garment which the respondent makes, wherein lies the unfair method of competition?



The respondent and its competitors sell to retailers and jobbers. It is not engaged in competition in selling to the purchasing public—its field of operation is that of jobbers and retailers. They, according to the Commission's finding, "generally" used the term "merino" just as does this respondent. But further, can this respondent be penalized and condemned for the ignorance of those whom the Commission has discovered? The respondent was using the term "merino" in accordance with correct usage and definition. What authority has the Commission to brand this respondent as engaging in an unfair method of competition because of the ignorance of a salesman or the dishonesty of a tradesman?

The Commission is without jurisdiction over the facts of this case. Misbranding of goods is not "unfair competition."

The purpose behind the act was the regulation of competition. Report, Senate Committee on Interstate Commerce, June 13, 1914, 63d Cong., 2d sess., No. 597, p. 10.

The phrase "unfair methods of competition" has been interpreted and defined by the courts. *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 407; *Federal Trade Commission v. Gratz*, 258 Fed. 314; and the many cases cited in *Kinney-Rome Co. v. Federal Trade Commission*, 275 Fed. 665.

First and foremost, therefore, there must be actual competition before there can be any unfair competition. In the case at bar there is no competition in the use of the word "merino." It has been used in the knitgoods industry for more than half a century to define a fabric made of cotton and wool. It never has been used to define an all wool garment. See *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427.

While the argument has been based upon a consideration of the term "merino," it applies with full force and effect to every term which the petitioner employed and which the Commission has condemned.

*Mr. Frank F. Reed and Mr. Edward S. Rogers*, by leave of court, filed a brief as *amici curiae*.

*Mr. Daniel Davenport, Mr. Morten Q. Macdonald and Mr. Walter Gordon Merritt*, by leave of court, filed a brief as *amici curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Winsted Hosiery Company has for many years manufactured underwear which it sells to retailers throughout the United States. It brands or labels the cartons in which the underwear is sold, as "Natural Merino", "Gray Wool", "Natural Wool", "Natural Worsted", or "Australian Wool". None of this underwear is all wool. Much of it contains only a small percentage of wool; some as little as ten per cent. The Federal Trade Commission instituted a complaint under § 5 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 719, and called upon the company to show cause why use of these brands and labels alleged to be false and deceptive should not be discontinued. After appropriate proceedings an order was issued which, as later modified, directed the company to "cease and desist from employing or using as labels or brands on underwear or other knit goods not composed wholly of wool, or on the wrappers, boxes, or other containers in which they are delivered to customers, the words 'Merino', 'Wool', or 'Worsted', alone or in combination with any other word or words, unless accompanied by a word or words designating the substance, fiber, or material other than wool of which the garments are composed in part (*e. g.*, 'Merino, Wool, and Cotton'; 'Wool and Cotton'; 'Worsted, Wool, and Cotton'; 'Wool, Cotton, and Silk'), or by a word or words otherwise clearly indicating that such underwear or other goods is not made wholly of wool (*e. g.*, part wool)."

A petition for review of this order was filed by the company in the United States Circuit Court of Appeals for the Second Circuit. The prayer that the order be set aside was granted; and a decree to that effect was entered.<sup>1</sup> That court said: "Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so." 272 Fed. 957, 961. The case is here on writ of certiorari. 256 U. S. 688.

The order of the Commission rests upon findings of fact; and these upon evidence which fills three hundred and fifty pages of the printed record. Section 5 of the act makes the Commission's findings conclusive as to the facts, if supported by evidence.

The findings here involved are clear, specific and comprehensive: The word "Merino" as applied to wool "means primarily and popularly" a fine long-staple wool, which commands the highest price. The words "Australian Wool" mean a distinct commodity, a fine grade of wool grown in Australia. The word "wool" when used as an adjective means made of wool. The word "worsted" means primarily and popularly a yarn or fabric made wholly of wool. A substantial part of the consuming public, and also some buyers for retailers and sales

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<sup>1</sup> The original order of the Commission was based on findings which rested upon an agreed statement of facts. The petition for review urged, among other things, that the agreed statement did not support the findings. Thereupon the Commission moved in the Court of Appeals that the case be remanded to the Commission for additional evidence as provided in the fourth paragraph of § 5 of the act. Under leave so granted the evidence was taken; and modified findings of fact were made. The modified order was based on these findings. It is this modified order which was set aside by the Court of Appeals; and we have no occasion to consider the original order or the proceedings which led up to it.

people, understand the words "Merino", "Natural Merino", "Gray Merino", "Natural Wool", "Gray Wool", "Australian Wool" and "Natural Worsted", as applied to underwear, to mean that the underwear is all wool. By means of the labels and brands of the Winsted Company bearing such words, part of the public is misled into selling or into buying as all wool, underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen who knowingly sell to their customers as all wool, underwear which is largely composed of cotton. Knit underwear made wholly of wool, has for many years been widely manufactured and sold in this country and constitutes a substantial part of all knit underwear dealt in. It is sold under various labels or brands, including "Wool", "All Wool", "Natural Wool" and "Pure Wool", and also under other labels which do not contain any words descriptive of the composition of the article. Knit underwear made of cotton and wool is also used in this country by some manufacturers who market it without any label or marking describing the material or fibres of which it is composed, and by some who market it under labels bearing the words "Cotton and Wool" or "Part Wool." The Winsted Company's product, labeled and branded as above stated, is being sold in competition with such all wool underwear, and such cotton and wool underwear.

That these findings of fact are supported by evidence cannot be doubted. But it is contended that the method of competition complained of is not unfair within the meaning of the act, because labels such as the Winsted Company employs, and particularly those bearing the word "Merino", have long been established in the trade and are generally understood by it as indicating goods partly of cotton; that the trade is not deceived by them; that there was no unfair competition for which another

manufacturer of underwear could maintain a suit against the Winsted Company; and that even if consumers are misled because they do not understand the trade signification of the label or because some retailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition.

This argument appears to have prevailed with the Court of Appeals; but it is unsound. The labels in question are literally false, and, except those which bear the word "Merino", are palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels, and not to deliberate deception by the retailers from whom the consumer purchases. While it is true that a secondary meaning of the word "Merino" is shown, it is not a meaning so thoroughly established that the description which the label carries has ceased to deceive the public; for even buyers for retailers, and sales people, are found to have been misled. The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.

The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value, does not prevent their use being an unfair method of competition.

A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.<sup>1</sup> And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby.<sup>2</sup> As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued.

*Reversed.*

MR. JUSTICE McREYNOLDS dissents.

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<sup>1</sup> *Von Mumm v. Frash*, 56 Fed. 830; *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 722; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 155.

<sup>2</sup> *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 538.